IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11919

National Labor Relations Board, *Petitioner*

v.

O'Keefe and Merritt Manufacturing Company and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, Individually and as Co-Partners, Doing Business as Pioneer Electric Company, *Respondents*

And

United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, Individually and as President of the United Steelworkers of America, C. I. O., *Intervenors*

On Petition for Enforcement With Modifications of an Order of the National Labor Relations Board

BRIEF FOR INTERVENORS

ARTHUR J. GOLDBERG
FRANK DONNER
THOMAS E. HARRIS,
718 Jackson Place, N. W.
Washington, D. C.,
Attorneys for Intervenors.

INDEX

TABLE OF AUTHORITIES CITED

Court Cases

National Labor Relations Board Cases

Statutes

Congressional Debates, Hearings, Reports

Miscellaneous

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 11919

National Labor Relations Board, *Petitioner*

v.

O'Keefe and Merritt Manufacturing Company and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, Individually and as Co-Partners, Doing Business as Pioneer Electric Company, *Respondents*

And

United Steelworkers of America, Stove Division, Local 1981, C. I. O., and Philip Murray, Individually and as President of the United Steelworkers of America, C. I. O., *Intervenors*

On Petition for Enforcement With Modifications of an Order of the National Labor Relations Board

---

BRIEF FOR INTERVENORS

Jurisdiction

This case is before the Court upon petition of the National Labor Relations Board (R. 195–205), pursuant to Section 10 (e) of the National Labor Relations Act, as amended, herein called the Act (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141, *et seq.*), for enforcement with modifications of its order issued against respondents on August 26, 1946, following the usual proceedings under Section 10 of the Act. Respondents are the O'Keefe and Merritt Manufacturing Company, and L. G. Mitchell, W. J. O'Keefe, Marion Jenks, Lewis M. Boyle, Robert J. Merritt, Robert J. Merritt, Jr., and Wilbur G. Durant, individually and as co-partners, doing business as Pioneer Electric Company, all of whom are collectively called the Company.

The jurisdiction of this Court is based upon Section 10 (e) of the Act, the unfair labor practices having occurred at the

Company's plant in Los Angeles, California.[1] The Board's Decision and Order (R. 174-190, 61-119) are reported in 70 N. L. R. B. 771.

STATEMENT OF THE CASE AS IT RELATES TO THE INTERVENTION

Upon the basis of charges and amended charges duly filed by the United Steelworkers of America, Stove Division, Local 1981, C.I.O., the Board issued its second amended complaint dated February 21, 1946, against the Company, alleging that the Company had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act (R. 24-34).

On June 4, 1946, Trial Examiner Henry J. Kent issued his Intermediate Report, finding that the Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including bargaining collectively upon request with the United Steelworkers of America, Stove Division, Local 1981, C.I.O., as the exclusive representative of the employees in the appropriate bargaining unit (R. 63-117).

On August 26, 1946, the Board issued its Decision and Order, with Board member Reilly dissenting in part, requiring the Company to cease and desist from certain unfair labor practices and to take certain affirmative action, including bargaining collectively upon request with United Steelworkers of America, Stove Division, Local 1981, C.I.O., as the exclusive representative of the employees in the appropriate bargaining unit (R. 174-190).

On August 22, 1947, there became effective certain amendments to the National Labor Relations Act. The amended provisions of the Act include Section 9 (f), (g) and (h) thereof (29 U.S.C.A., sec. 159 (f), (g) and (h)). Section 9 (h) provides as follows: [2]

---

[1] In the conduct of its business the Company makes substantial sales in interstate commerce (R. 69-72; R. 1056, 1268). Jurisdiction is not contested (*ibid.*, R. 321).

[2] Section 9 (c), referred to in Section 9 (h), is the section in the Act providing for the holding of elections by the Board upon petition by labor organizations, individuals, employees, groups of employees and employers.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

Section 9 (f) and (g), which are not directly involved in this case, impose upon labor organizations certain obligations, subject to the same sanctions as are imposed by Section 9 (h), to file information with the Secretary of Labor relating to the finances of labor organizations, their internal affairs and structure.

Thereafter, the Board filed in this Court a petition for enforcement, with modifications, of its Order, dated May 28, 1948. Among other modifications requested is included a request to this Court to condition enforcement of the bargaining portions of the Order upon compliance with Section 9 (f), (g) and (h) of the Act within thirty (30) days from the date of the decree enforcing the Order (R. 195-205).

On August 5, 1948, the United Steelworkers of America, Stove Division, Local 1981, C.I.O., and Philip Murray, Indi-

---

Section 9 (e), referred to in Section 9 (h), provides for the holding of an election for the purpose of determining whether a majority of the employees authorize the bargaining agent to negotiate an agreement with the employer making union membership a condition of employment. In the absence of such an authorization, the negotiation of such an agreement is made illegal by Section 8 (b) (1) of the Act; cf. Section 8 (a) (3).

Section 10 (b), referred to in Section 9 (h), is the provision of the Act authorizing the Board to issue complaints that unfair labor practices have been committed.

vidually and as President of the United Steelworkers of America, C.I.O., herein called the Union, filed in this Court a Motion to Intervene in which it recited that the United Steelworkers of America had complied with Section 9 (f) and (g) of the Act and that Local 1981 would comply with said sections within thirty (30) days from any decree of this Court. The Union further recited in its Motion that neither the officers of the United Steelworkers of America nor of Local 1981 would comply with the requirements of Section 9 (h) of the Act for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional and void and that said section violates Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States. The Union therefore prayed that it be permitted to intervene for the purpose of urging that Section 9 (h) of the Act is unconstitutional and void and that the Court enforce the Board's Order without any modification requiring compliance with said Section 9 (h) (R. 1763-1777). The Court thereupon entered an Order allowing intervention (R. 1778).

STATEMENT OF POINTS RELIED ON

1. Freedom of belief cannot be restricted.

   West Virginia v. *Barnette,* 319 U.S. 624, 634, 642; *DeJonge* v. *Oregon,* 299 U.S. 353; *Stromberg* v. *California,* 282 U.S. 359; *Whitney* v. *California,* 274 U.S. 357, 375; *Gitlow* v. *New York,* 268 U.S. 652, 672, dissenting opinions of Justices Holmes and Brandeis.

2. Utterances in advocacy of belief or opinion are immune from legislative limitation no matter how unpopular they may be or how non-conformist a philosophy they may express.

   Herndon v. *Lowry,* 301 U.S. 242; *Thornhill* v. *Alabama,* 310 U.S. 88; *Bridges* v. *California,* 314 U.S. 252; *Schneider* v. *New Jersey,* 308 U.S. 147; *Lovell* v. *City of Griffin,* 303 U.S. 444.

3. Political rights of discussion and affiliation involve in addition constitutional rights of freedom of assembly, association and speech which are protected by the First Amendment.

DeJonge v. *Oregon,* 299 U.S. 353, 365; *Whitney* v. *California,* 274 U.S. 357, 375; *Stromberg* v. *California,* 282 U.S. 359, 369.

4. Political rights are cloaked with the protection of the Ninth and Tenth Amendments as well as the First.

   United Public Workers v. *Mitchell,* 330 U.S. 75, 94.

5. The fundamental purpose of protecting civil rights is to insure political freedom, and to make the government responsive to the will of the people. Political rights must receive the fullest judicial protection under the First Amendment.

   DeJonge v. *Oregon,* 299 U.S. 353, 365; *Whitney* v. *California,* 274 U.S. 357, 375; *Stromberg* v. *California,* 282 U.S. 359, 369.

6. Expurgatory oaths as to political belief are banned by the First, Ninth and Tenth Amendments.

   West Virginia v. *Barnette,* 319 U.S. 624; *Cummings* v. *Missouri,* 4 Wall. 277; *DeJonge* v. *Oregon,* 299 U.S. 353; *Ex parte Garland,* 4 Wall. 333, 380; *United Public Workers* v. *Mitchell,* 330 U.S. 75.

7. A statute purporting to restrict freedom of speech, press and assembly which is vague and indefinite, is void on its face.

   Winters v. *New York,* 333 U.S. 507; *Stromberg* v. *California,* 282 U.S. 359, 369; *Herndon* v. *Lowry,* 301 U.S. 242, 258; *Thomas* v. *Collins,* 323 U.S. 516, 535; *Cantwell* v. *Connecticut,* 310 U.S. 296; *Near* v. *Minnesota,* 283 U.S. 697; *Grosjean* v. *American Press Co.,* 297 U.S. 233, 251.

8. In prosecutions under Section 35-A of the Criminal Code (18, U.S.C.A., sec. 80), the constitutionality of the statute in connection with which a false statement was made to the government is considered collateral to the crime charged and cannot be challenged.

   Kay v. *United States,* 303 U.S. 1, 6; *United States* v. *Barra* (C.C.A. 2), 149 F. (2d) 489; *United States* v. *Presser* (C.C.A. 2), 99 F. (2d) 819.

9. The authority to enact any statute which constitutes a bill of attainder is expressly excluded by the Constitution

from the delegation of legislative powers to Congress.

Art. 1, Sec. 9, cl. 3—Constitution.

10. A bill of attainder is a legislative act which usurps the judicial function by making a legislative declaration of guilt.

U.S. v. *Lovett,* 328 U.S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

11. Exclusion from a vocation is a form of punishment within the definition of a bill of attainder.

U.S. v. *Lovett,* 328 U.S. 303, 315, 316; *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333.

12. A description of organizations in general terms, which serves to identify a proscribed group is within the definition of a bill of attainder.

U.S. v. *Lovett,* 328 U.S. 303, 315, 316, *Cummings* v. *Missouri,* 4 Wall. 277.

13. A legislative declaration of guilt which is contained in a bill of attainder is *a fortiori* a violation of the due process clause of the Fifth Amendment.

Frankfurter, J. in *U. S.* v. *Lovett,* 328 U.S. 303, 321.

14. The doctrine of personal guilt is at the very essence of the concept of freedom and due process of law.

Bridges v. *Wixon,* 326 U.S. 135, 161, 163; *Schneiderman* v. *U. S.,* 320 U.S. 118, 136.

15. Discriminatory legislative action which as arbitrary and injurious violates the Fifth Amendment.

Nichols v. *Coolidge,* 274 U.S. 531; *Wallace* v. *Currin,* 95 F. (2d) 856, 867 (C.C.A. 4), affirmed 306 U.S. 1; *Minski* v. *U.S.,* 131 F. (2d) 614, 617 (C.C.A. 6); *U.S.* v. *Ballard,* 12 F. Supp. 321, 325-326 (W.D. Ky.); *U.S.* v. *Yount,* 267 Fed. 861, 863; *U.S.* v. *Lovett,* 328 U.S. 303.

16. The right of workingmen to organize and to bargain collectively and the day to day functioning of labor organizations involve constitutional rights of speech, press and assembly.

N.L.R.B. v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33, 34; *Thomas* v. *Collins,* 323 U.S. 516; *Texas and New Orleans Railroad Co.* v. *Railway and Steamship Clerks,* 281 U.S. 548; *Hague* v. *CIO,* 507 U.S. 496; *Thornhill* v. *Alabama,* 310 U.S. 88

17. The choice of labor union officers by the members is an exercise of constitutional rights of free speech and free assembly.

    Thomas v. *Collins,* 323 U.S. 516, 546.

18. Legislative action which effects a change in existing law is subject to judgment for consistency with constitutional guarantees, whether or not the effect of the action was to remove a preexisting right or remedy.

    Truax v.*Corrigan,* 257 U.S. 312; *Senn* v. *Tile Layers' Union,* 301 U.S. 468.

19. Denial of government services and facilities must be in accord with constitutional guarantees

    Frost v. *Railroad Commission,* 271 U.S. 583, 593; *U.S.* v. *Schneider,* 45 F. Supp. 848 (E.D. Wisc. 1942); *Danskin* v. *San Diego Unified School Dist.,* 28 Cal. (2d) 536, 171 P. (2d) 886; *Hannegan* v. *Esquire,* 327 U.S. 146, 156; Mr. Justice Brandeis, dissenting in *United States ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson,* 255 U.S. 407, 429-434.

20. In First Amendment cases, it is the character of the right, not of the limitation, which determines what standards govern the determination of validity.

    Thomas v. *Collins,* 323 U.S. 516, 530.

21. The burden of sustaining the constitutionality of legislation abridging rights guaranteed by the First Amendment is upon the government.

    West Virginia v. *Barnette,* 319 U.S. 624, 639; *Thomas* v. *Collins,* 323 U.S. 516, 529-530; *Schneider* v. *New Jersey,* 308 U.S. 147; *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102; *Bridges* v. *California,* 314 U.S. 252, 262-263; *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153; *Marsh* v. *Alabama,* 326 U.S. 501, 509.

22. A statute in the civil rights area must be narrowly drawn to deal with the precise evil which the legislature is seeking to curb.

    Schneider v. *New Jersey,* 308 U.S. 147; *Cantwell* v. *Connecticut,* 310 U.S. 296; *DeJonge* v. *Oregon,* 299 U.S. 353.

23. Even where a statute deals only with advocacy or expression and meets other appropriate constitutional standards, it will not survive the Constitution unless the substantive end sought is the protection of a paramount and substantial interest and unless the activity regulated constitutes a clear and immediate danger to that interest.

Thomas v. *Collins,* 323 U.S. 516, 530; *Bridges* v. *California,* 314 U.S. 252, 253.

SUMMARY OF ARGUMENT

The expurgatory oath requirement of Section 9 (h) is directed primarily, if not exclusively, at political belief or opinion.

Its legislative history reveals that the section was a result of a deliberate attempt to impose sanctions on opinion and belief. Portions of Section 9 (h) important to a determination of the issues in this case, such as the provision as to expurgatory oaths and the provision as to initiation of complaints of unfair labor practices under Section 10 (b), were inserted into the bill for the first time in conference and received little or no consideration. The categories set up in Section 9 (h) were described by the sponsors of the section in such dangerously loose phraseology as "Communists or subversive officers," "unions whose officers are Communists or follow the party line," "Communists and fellow travelers," "front organizations," and "party line officers."

Section 9 (h) attempts a restriction on freedom of expression and political opinion which is so extreme that its parallel cannot be found in the facts of any of the recorded cases which constitute our civil liberties jurisprudence. It is characterized by an interference with freedom of *belief* and *opinion,* and by resort to an expurgatory oath.

Freedom of belief cannot be abridged. Our courts have consistently frowned upon any legislation which even approaches such abridgment.

Political freedom involves constitutional rights of freedom of assembly and freedom of association. Limitation of such rights violates the First Amendment.

The right to engage in political activity is a basic right re-

served to the people and protected by the Ninth and Tenth Amendments. Section 9 (h) also contravenes the guarantees of the Ninth and Tenth Amendments. Judicial interference is peculiarly called for because restraints involved occur in the political arena; the fundamental purpose of protecting civil rights is to insure political freedom.

Labor is importantly involved in political action in order to protect the rights of workingmen and to improve their conditions. Leaders of modern labor organizations are necessarily participants in the political life of the country and express the political views of the members of the labor organizations of which they are officers. Abridgment of the political rights of such officers is in consequence an abridgment of the political rights of the members of the labor organizations.

The expurgatory oath is a device historically used to exact conformity and to control thought. It has no warrant in the Constitution and is beyond federal power.

The categories set up in Section 9 (h) are so vague and indefinite as to conflict with the First Amendment. The reasons for the rigid constitutional requirement of definiteness in any such restrictive statute are, first, that the absence of adequate notice as to a proscribed activity acts as an effective previous general restraint and paralyzes freedom of expression, and, second, that vagueness of a statute infringing civil rights lays the basis for discriminatory and unfair application, especially where minority groups are concerned.

These reasons have particular reference to the activities of a labor organization, its members and officers. Charges of "subversion" are common in industrial relations situations. Previous charges, made in the course of industrial disputes as to the inclusion of petitioners in the categories proscribed by the statute, bear evidence that the reasons for the requirement of definiteness also have peculiar application to the petitioners in this case.

The categories which Section 9 (h) attempts to set up and the descriptive phrases used in connection with these categories are vague and indefinite and must fall before the Fifth Amendment.

Section 9 (h) is a bill of attainder and is therefore a use of

power which the Constitution unequivocally declares Congress can never exercise. Section 9 (h) proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legislative declaration of the guilt of individuals and groups with respect to engaging in such activities.

Section 9 (h) when considered in each of its aspects and when considered as a whole, violates those concepts of fair dealing and of the protection of the individual against abuses by government which are the bases of the constitutional guarantees. Section 9 (h) violates all due process requirements. Section 9 (h) is a bill of attainder and is *a fortiori* in violation of the Fifth Amendment. Section 9 (h) does violence to the doctrine of personal guilt and is therefore a violation of the Fifth Amendment. Section 9 (h) sets up arbitrary classifications in that it does not apply the same rules to the employers with whom the labor organizations deal in the industrial relations scene and is therefore a violation of the Fifth Amendment. Section 9 (h) utilizes an expurgatory oath and is therefore in violation of the Fifth Amendment.

The method of enforcing Section 9 (h) emphasizes its unconstitutionality. To avoid the obstacles which stand in the way of direct sanctions, Section 9 (h) threatens the destruction of a labor organization in order to coerce it to surrender the right to elect officers of its own choice and to compel it to oust officers who refuse to submit to invasion of basic liberties.

By denying the right to bargain with the employer on a basic issue and by imposing disabilities upon non-conforming unions which are refused Board certification, and in other ways, Section 9 (h) interferes with the fundamental right to bargain collectively. Since collective bargaining is the prime purpose of labor organizations, the right of self-organization and the right to engage in concerted activities are also abridged. These rights are civil rights protected by the First Amendment.

The full impact of Section 9 (h) upon non-conforming organizations such as petitioner labor organization, is to impair collective bargaining, to imperil its representative status in plants in which it has functioned for years, to promote the

selection of unrepresentative bargaining agents, to encourage industrial unrest, to invite repudiation of the bargaining relationship, to make futile and meaningless the organizing process and to make illegal the exercise of traditionally sanctioned concerted activities. This deprives petitioning labor organization and its members of basic constitutional rights.

The device chosen to effectuate the purpose of the statute is a deliberate interference with the freedom of labor union members to choose their own officers. The right to assembly obviously includes the right to members of an organization freely to elect their own officers and the right of free speech. Section 9 (h) is therefore an abridgment of the rights of members of labor organizations to free speech and to assembly. The method of enforcement of Section 9 (h), that of inducing third parties to exert sanctions against labor union officers which limit such officers in their freedom of political belief and in their freedom of political activity, violates the Constitution.

The withdrawal of use of government facilities which over the course of the years have become an essential to the life of labor unions, and which have become an integral part of industrial relations practices, is not a mere withdrawal of a benefit. It is a change in substantive law which must be viewed in light of constitutional tests. However, even if verbalized as a grant of a benefit upon condition, the statute cannot avoid judgment upon the basis of the Constitution. It is the character of the right involved and not the character of the restriction which governs the constitutional standards to be applied.

The burden of establishing that Section 9 (h) is constitutional is upon the Board, since the case involves rights guaranteed by the First Amendment. This rule must be observed more rigidly because the case involves political rights.

Section 9 (h) cannot possibly meet the requisite constitutional tests.

The statute is not narrowly drawn but invades the civil rights of those with whom the legislation is not primarily concerned, and imposes blanket obligations on whole classes of individuals.

The vagueness of Section 9 (h) condemns it under the Fifth

Amendment, and even more certainly under the First Amendment.

There is no constitutional justification for any invasion of freedom of belief. Insofar as Section 9 (h) limits other freedoms guaranteed by the First Amendment, the Board cannot possibly meet the requirement that the activities regulated must constitute a close and immediate threat to a substantial interest which the State may protect.

ARGUMENT

Preliminary Statement

This case presents to the Court an issue of transcendent importance. That issue is whether a federal statute which calls for expurgatory affidavits from union officers as to their political belief is constitutional. The statute, in its operation, abridges the political rights of union officers and union members and, with respect to labor organizations whose officers have not filed affidavits with the Board, limits and restricts their rights to engage in concerted activities and to bargain collectively. It is the contention of the Union that the statute abridges freedom of speech, press and assembly and thereby contravenes the First, Fifth, Ninth and Tenth Amendments.

The federal statute involved is the Labor-Management Relations Act, 1947 (29 U.S.C.A., sec. 141 *et. seq.)* The 1947 Act is a comprehensive scheme of regulation of the process of self-organization and collective bargaining. A principal characteristic of the statute is that it thrusts the Federal Government into the collective bargaining process to a greater extent than ever before.

This case is concerned with that portion of the 1947 Act, Section 9 (h), which presents the Union, the members and officers with alternatives. Their choice is to have the Union officers file expurgatory affidavits as to their political beliefs and opinions or to be subjected, first, to the imposition of certain severe restrictions and burdens to which other labor organizations are not subject, and, second, to the release of the employers with whom they deal from certain regulations to which employers who deal with other labor organizations must conform.

It is our contention that the first alternative, that of the expurgatory affidavit, is an unconstitutional interference with the freedom of speech and assembly of petitioner Philip Murray and of other labor union leaders. It is our contention further that these unconstitutional restraints peculiarly call for judicial intervention because they occur in connection with political beliefs and opinions. The statute burdens the exercise of civil rights precisely in that area where such exercise is most vital to the preservation of a democratic society.

A limitation upon the political conscience of a union officer is by the same token a limitation upon the political rights of the members of the union for whom the officer is a spokesman and representative in the affairs of the Nation. Such limitation upon political rights and expression have no warrant in the Constitution.

In the case of Section 9 (h) these limitations upon the political rights of union officers and of union members are particularly indefensible.

Section 9 (h) rests its requirements upon a legislative finding of guilt of individuals and of groups in engaging in activity deemed harmful, and is therefore a bill of attainder, excluded, by express provision in the Constitution, from the powers delegated to the Congress.

This section defines the individuals and groups as to whom this legislative finding is made in terms so vague and indefinite as to afford no security to freedom of political belief and discussion. The definitions give no adequate notice of the proscribed political belief or expression and so broadly interfere with political belief and expression.

Section 9 (h) ignores the constitutional requirement that legislation abridging civil rights must be narrowly drawn. The statute is directed at opinions and beliefs rather than at the conduct which is claimed to flow from such opinions and beliefs. Moreover, the reach of the statute is such as to abridge not only the civil rights of officers of labor organizations, but also the civil rights of members of labor organizations.

The Board has contended that the presence of the secon alternative cures the constitutional infirmities of the first. It

is our view that the second alternative intensifies these infirmities. The second alternative is the sanction for not choosing the first. It is a sanction which is equivalent to the outlawing of the labor union from the arena of organization and collective bargaining. And, as we have already indicated, the impact of these sanctions creates independent grounds for constitutional objection, for the statute so drastically impairs the right to organize and to bargain collectively as to constitute an abridgment of the right of union members to engage in the constitutionally protected activities of free speech and assembly necessarily involved in the organizing process.

Section 9 (h) also poses to the Court the issue of whether Congress may attempt to apply sanctions for activity deemed harmful by way of creating inducements to third parties. From another aspect this question is whether Congress may constitutionally interfere in the internal affairs of labor organizations by creating inducements and pressures of the type here involved upon labor union members to select officers holding government-approved political views.

I.

SECTION 9 (h) INVADES THE POLITICAL FREEDOM OF PETITIONER PHILIP MURRAY AND OF THE MEMBERS OF PETITIONING LABOR ORGANIZATION IN VIOLATION OF THE FIRST, NINTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. *The statute and its background*

The statute here under review imposes upon officers of labor organizations the obligation to file an affidavit disclaiming certain proscribed types of political belief and affiliation and imposes certain sanctions upon the labor organization involved in the event of a failure to file the required affidavit. An examination of the affidavit requirement reveals that it is directed primarily, if not exclusively, at political belief or opinion. The officer filing the affidavit must swear:

1. That he is not a member of the Communist Party
2. That he is not affiliated with such party, and

3. That he does not believe in and "is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The only language in the affidavit which might conceivably deal with something more than mere opinion or belief is a phrase stating that the officer must swear that he does not "support" the organization proscribed in the statute. To the extent that this word imports more than belief or opinion, it constitutes an exception to the remainder of the affidavit requirement.

The forerunner of Section 9 (h) was Section 9 (f)(6) of H. R. 3020, introduced in the House of Representatives on April 10, 1947, by Congressman Hartley of New Jersey. That Section read:

> "(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d), is a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party, or believes in, or is a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

It will be observed that no provision appeared as to an expurgatory oath or as to a bar to non-conforming labor organizations to initiate charges of employer unfair labor practices under Section 10 (b).

We think it accurate to say that the legislative history of the bill on the House side reveals a clear and deliberate attempt to impose sanctions upon opinion and belief. See 93 *Cong. Rec.* 3533, 3535, April 11, 1947; 93 *Cong. Rec.* 3577, 3578, April 16, 1947; H. Rep. No. 245 (80th Cong., 1st Sess.), April 11, 1947.

In the original Senate bill—S. 1126, introduced by Senator Taft of Ohio on April 17, 1947—no provisions similar to those

now found in Section 9 (h) were included. The section 9 (h) provisions were incorporated into the Senate bill by way of an amendment sponsored by Senator McClellan of Arkansas, who asked that Section 9 (f) (6) of the House bill be included in the Senate version.

Thus, as the bill went to conference, there was no provision as to initiation of charges of unfair labor practices under Section 10 (b) and no provision for expurgatory oaths. In conference, both provisions were added.

The conference report (*H. Rep. No. 510,* 80th Congress, 1st Session, June 3, 1947), simply recites the provisions of Section 9 (h), as revised by the conference group. Debate on these new provisions appears to have been limited to a point of order in the House, raised unsuccessfully by Congressman Hoffman of Michigan, to the effect that in adding the bar to initiation of charges of employer unfair labor practices under Section 10 (b), the conference group was incorporating new material, and a subsequent remark by Congressman Hartley to the effect that:

> "The bill further prohibits labor organizations from invoking the processes of the act unless all of the officers file affidavits with the board that they are not members of the Communist Party or other subversive organizations." (93 *Cong. Rec.* 882, June 4, 1947.)

The Senate does not appear to have discussed the inclusion of the 10 (b) provision. On the matter of the expurgatory oath, mention was made of it in a summary of the difference between the Senate and conference versions which Senator Taft placed in the Congressional Record, and in a statement by Senator Taft on the floor of Congress in which he said:

> "MR. TAFT. Yes. There is nothing new. We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. Otherwise, the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as

> to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill. But there is no provision as to that subject that was not in one bill or the other." 93 *Cong. Rec.* 6604, June 6, 1947.

Congressional debate on the contents of the proscribed categories in Section 9 (h) appears to have been limited to the issue of whether the word "is" or the words "ever has been" should be used with respect to members and affiliates of the Communist Party. No definitions of the categories were attempted. But the use of dangerously loose phraseology, so frequent in the political arena in these times, indicated the conceptions of the proscribed categories which were prevalent. For example, we may observe these phrases: (1) "Communists or subversive officers" (*H. Rep. No. 245, supra,* p. 5); (2) "unions whose officers are Communists or follow the party line" (*H. Rep. No. 245, supra,* p. 10); (3) "Communists and fellow travellers" (*H. Rep. No. 245, supra,* p. 10, 93 *Cong. Rec.* 3577); (4) "Front organizations" (*H. Rep. No. 245, supra,* p. 39); and (5) "party-line officers" (93 *Cong. Rec.* 3577).

B. ***Section 9 (h) on its face violates basic freedoms.***

Section 9 (h) is a product of a growing attack upon civil liberties that is an exaggerated counterpart of the invasion of civil rights which occurred after the first World War. Today the traditional barriers against invasion of freedom of belief, freedom of conscience and freedom of speech, press and assembly are being subjected to pressures in almost every field. See O'Brian, *"Loyalty Tests and Guilt by Association,"* 61 Harv. L. Rev. 592; *In Times of Challenge, U. S. Liberties, 1946-47,* American Civil Liberties Union; Gellhorn, *"A Report on a Report of the House Committee on Un-American Activities,"* 60 Harv. L. Rev. 1193; Chafee, *Letter to Honorable Alexander Wiley,* 94 Cong. Rec., No. 104, A. 3848, June 9, 1948; Wyzanski, *"The Open Window and the*

Open Door," 35 Calif. L. Rev. 336; *"Letter to the President by Members of Yale Faculty of Law,"* 4 A.B.A.J. 15, 16; Andrews, *Washington Witch Hunt* (1948).

Section 9 (h) is a direct assault upon the rights of officers of labor organizations and of members of such organizations to freedom of expression and freedom of political activity. As such, it transcends federal powers. But Section 9 (h) is more than that. It is an attempt at a restriction upon these freedoms which is so extreme that its parallel cannot be found in the facts of any of the recorded cases which constitute our civil liberties jurisprudence. See, for example, *Abrams* v. *U. S.*, 250 U.S. 616; *Cantwell* v. *Connecticut,* 310 U.S. 296; *DeJonge* v. *Oregon,* 299 U. S. 353; *Hague* v. *C.I.O.,* 307 U. S. 496; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Schneider* v. *New Jersey,* 308 U. S. 147; *Stromberg* v. *California,* 282 U. S. 359; *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia* v. *Barnette,* 319 U. S. 624; *Winters* v. *New York,* 333 U. S. 507; *Whitney* v. *California,* 274 U. S. 357.

Two characteristics serve to distinguish Section 9 (h) from other statutory attempts to regulate freedom of expression.

1. Section 9 (h) interferes with freedom of *belief* and *opinion*;

2. Section 9 (h) resorts to an expurgatory oath, a device historically used to exact conformity and to control thought.

1. We cannot overemphasize the fact that the present case involves freedom of belief and opinion. Freedom of political belief is a fundamental right guaranteed to the people by the Constitution. It is not merely the means for promoting that belief which fall within the guarantees of the Bill of Rights. Rather, political belief itself, the free right to hold opinions is a basic right of the American people. It is this right which defines the character of our government and the rights of freedom of speech, press and assembly are guaranteed so that this right to political freedom shall be furthered and shall not be destroyed by arbitrary official action. Our courts have consistently frowned upon any legislative action which even approaches interference with opinion or belief. Thus in *West Virginia* v. *Barnette, supra,* the Supreme Court

struck down as invalid an enforced avowal of belief. The Court pointed out (pp. 634, 642):

> "Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.
>
> * * *
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

See, also, *Stromberg* v. *California, supra; Gitlow* v. *New York,* 268 U. S., 652, 672, dissenting opinions of Justices Holmes and Brandeis, *DeJonge* v. *Oregon, supra.*

Moreover, it should be pointed out that the restraint here involved is wholly in the realm of ideas or principles. For this is not a case in which a statutory duty to engage in certain generally prescribed conduct is violated because of a claimed conscientious belief or scruple. Compare *In re Summers,* 325 U. S. 561 and *Prince* v. *Massachusetts,* 321 U. S. 158.

In addition, this is not a case in which a fundamental right has incidentally fallen victim to a broad regulatory statute directed to other ends. There is more involved in this case than a regulatory measure which happens, in its application, to collide with an asserted constitutional right. We are not here confronted with a tax measure (*Jones* v. *City of Opelika,* 319 U. S. 103), or a regulation dealing with breach of the peace (*Cantwell* v. *Connecticut,* 310 U. S. 296), or a licensing measure (*Schneider* v. *New Jersey,* 308 U. S. 147), the enforcement of which in a particular situation burdens the exercise of constitutional rights. The Supreme Court has been vigilant in preserving rights against abridgment in this manner. However, in this case, Congress passed a statute which expressly and on its face attacks political opinion and belief. And, of course, by the same token, it specifically attacks the political opinions and beliefs of a particular identified group,

namely, officers of labor organizations. See *Matter of Northern Virginia Broadcasters, Inc.*, 74 N.L.R.B. No. 2, 20 LRRM 1319.

Section 9 (h) is a shocking and profoundly offensive measure because it imposes sanctions for the alleged evil of harboring "dangerous thoughts." See, Barnett, *"The Constitutionality of the Expurgatory-Oath Requirement of the Labor-Management Relations Act of 1947,"* 27 Oreg. L. Rev. 85, 93. Because Section 9 (h) goes far beyond punishment for advocacy of doctrines claimed to threaten the dominant interests of the state and is concerned primarily with opinion, it requires the forthright condemnation of this Court.

Even when what is involved are utterances in advocacy of belief or opinion, there is an impassable constitutional barrier which protects such utterances no matter how unpopular they may be or how non-conformist a philosophy they may express. See *Herndon* v. *Lowry, supra; Lovell* v. *Griffin, supra; Schneider* v. *New Jersey, supra; Thornhill* v. *Alabama, supra; Bridges* v. *California,* 314 U. S. 252.

Moreover, judicial intervention against the restraints of Section 9 (h) is peculiarly called for because the restraints involved occur in the political arena. The fundamental purpose of protecting civil rights is to insure political freedom.[3] As Justice Brandeis stated in *Whitney* v. *California, supra* (p. 375):

> "Those who won our independence . . . recognized the risks to which all human institutions are subject. But they knew that *order cannot be secured merely through fear of punishment for its infraction;* that it is haz-

---

[3] And it was viewed in that very light from the beginnings of our form of government. Madison, in his report on the Virginia Resolutions directed against the Alien and Sedition laws of 1808 stated:

"Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

> ardous to discourage thought, hope and imagination; that fear breeds repression; *that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.*" (Italics supplied.)

In *Stromberg* v. *California, supra* (p. 369), Chief Justice Hughes held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

In *DeJonge* v. *Oregon, supra* (p. 365), the Court adverted to the "imperative" need "to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Political affiliation necessarily involves constitutional rights of freedom of assembly and freedom of association. Section 9 (h) impairs the right of leaders of labor organizations to form, join or collaborate with organizations of a political nature. Cf. *DeJonge* v. *Oregon, supra.*

The fact that the statute impairs basic rights of political freedom brings into play the Ninth and Tenth Amendments which are, equally with the First Amendment, a part of the Bill of Rights. These Amendments state specifically: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" (Amendment IX) and reserve "to the people" the powers not delegated to the Federal Government (Amendment X).

While the Tenth Amendment has frequently been relied on in attempts to defeat the exercise of federal regulation on the ground that no power has been granted to the federal government by the Constitution to encompass the regulation in ques-

tion and that the rights of the states have been infringed, the present case involves not the rights of the states as against the exercise of federal power but rights reserved to the people which are equally protected by the Constitution against both state and federal action. The Supreme Court has recognized in *United Public Workers* v. *Mitchell,* 330 U. S. 75, that the right to engage in political activity is a basic right protected by the Ninth and Tenth Amendments. The Court there stated (at p. 94):

> "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved."

The fact that the statute limits the constitutional rights of officers of labor organizations is scarcely a consideration in its mitigation. Petitioners include among their important activities, political activity. Just as individual workingmen must act in concert if they are to further their economic interests, so they must express their political views through the spokesmen for their group if they are to exercise their political freedom effectively. As one writer has put it:

> "*Labor has always been in politics.*
>
> "It is difficult to conceive of any functioning labor organization which does not take part in politics. For the leaders of labor, politics was, and is, the other side of the trade-union coin.
>
> "Every labor organization is, in principle, dedicated to the protection of the rights of its members and to the improvement of their conditions. If these objectives are to be attained, labor must ask for legislation of many kinds. Whether a union succeeds or fails in getting its demands depends entirely upon whether the legislators are for labor or against labor. In turn, very naturally, labor supports those legislators friendly to labor, and repudiates those who are anti-labor.
>
> "It has always been so.
>
> "As far back as 1886, Samuel Gompers said: 'We regard with pleasure the recent political action of organized workingmen of this country, and by which they have demonstrated that they are determined to exhibit their

political power.'" Joseph Gaer, *"The First Round"*, (1944), p. 49.[4]

With the increased participation of government in our economic life, workers are forced into politics through their unions in order to preserve their economic security and standard of living. If an individual is helpless in dealing with his employer, then how can it be said that he is more able to deal with the powerful employer-dominated political interests which, unless restrained, can decisively fix or alter the terms and conditions under which he must live? In sheer self-protection he must associate with others in order to preserve those political values which enforce and promote his economic interests. He must organize politically in order to defend against political attack the gains achieved through his economic strength. He must organize politically in order to meet the organized political attack of other interests in our national life. And he must organize politically in order to safeguard and

---

[4] The best available account of the forces which have stimulated labor's political activities is Taft, *Labor's Changing Political Line*, 43 Journal of Pol. Ec. 634 (1937).

The following texts document the historic role of labor in American political life:

Beard, *The American Labor Movement, A Short History* (1935), pp. 33–46, 54–61, 80–85, 103–112, 165–171; Bimba, *The History of the American Working Class* (1927), pp. 84–89, 204–208, 323–330; Carroll, *Labor and Politics* (1923), pp. 27–54, 80–138; Childs, *Labor and Capital in National Politics* (1930), Commons and Associates, *History of Labor in the United States*, vols. I and II (1918), Vol. I, pp. 169–335, 369, 454–471, 522, 535, 548–559; Vol. II, pp. 85–109, 124–130, 138–146, 153–155, 168–171, 240–251, 324, 341–342, 351–353, 461–470, 488–493; Daugherty, *Labor Problems in American Industry* (1933) pp. 622–629; Foner, *Labor Movement in the United States* (1947), pp. 104–105, 130–134, 140, 149–166, 210–217, 245–248, 262–263, 334–336, 357–359, 372–373, 423–429, 475; Harris, *American Labor* (1938), pp. 33–55, 65–69; Hoxie, *Trade Unionism in the United States* (1917), pp. 78–102; Lorwin, *The American Federation of Labor* (1933), pp. 88–93, 123–126, 221–226, 351, 397–425; Millis and Montgomery, *Organized Labor* (1945), pp. 7, 10, 27, 29-31, 34, 42n, 51, 52n, 54–55, 57n, 62, 67, 71, 81, 91, 108–111, 118, 123–129, 141, 143, 149, 178, 181–188, 232–238, 303–305, 311, 313, 317–320, 348–349, 600, 669, 829, 890; Perlman, *A History of Trade Unionism in the United States* (1929), pp. 146–160, 285–294; Perlman and Taft, *History of Labor in the United States, 1896–1932* (1935), pp. 150–166, 525–537; Schlesinger, *The Age of Jackson* (1945), pp. 132–158, 180–185; Walsh, *C. I. O., Industrial Unionism in Action* (1937), pp. 248–271; Ware, *The Labor Movement in the United States, 1860–1895* (1929), pp. 350–370; Ware, *The Industrial Worker, 1840–1860* (1924), pp. 154–162.

promote his right to form and join unions and his right to bargain collectively and to strike.[5]

Leaders of modern labor organizations are necessarily participants in the political life of their local community, of their State, and of the Nation. They express the political views of their organizations. They consult with and are consulted by other organizations and individuals. They lend support to joint projects and they ally themselves with others to induce the passage of legislation and to achieve other political goals. They participate in political planning and election campaigns. They take part in government administration and in the shaping of government policy, is in the case of the tripartite National War Labor Board and National Wage Stabilization Board, in which labor leaders represented the Labor point of view. And they exert an influence in political affairs commensurate with the size of the labor organizations which they head.

Members of labor organizations, aware of the important role of their union in political life, are influenced in their choice of union officers by the political views and beliefs of the candidates. A statute which impairs the policial rights of a labor union officer is an effective interference with the freedoms of speech, press and assembly of those who elected him. Compare, *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209.[6]

2. The objections to Section 9 (h) are intensified rather than mitigated by the fact that it is implemented by the requirement of an expurgatory oath. The expurgatory oath as a safeguard of conformity has been historically condemned because of its obvious repugnance to freedom of conscience. See, for example, *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, 380. Here, as the Supreme Court said in *Cummings* v. *Missouri, supra* (p. 318), "The oath is directed not merely against overt and visible acts of

---

[5] One of the most powerful factors which brought labor into political life was the evil of "Government by Injunction." Lorwin, The American Federation of Labor (1933), pp. 88, 90.

[6] We discuss subsequently the contention that the sanctions of the statute improperly interfere with the rights of the union members to elect officers of their own choosing.

hostility to the government, but is intended to reach words, desires, and sympathies also."

The requirement that those subject to the statute swear an oath with respect to their beliefs subject to the penalties for perjury is profoundly inconsistent with democratic guarantees.[7]

II.

THE VAGUENESS OF SECTION 9 (h) CONDEMNS IT AS UNCONSTITUTIONAL.

Section 9 (h) requires a sworn avowal from each officer of a labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit, that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, or is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." It is submitted that these categories are so vague and indefinite as to conflict with the First Amendment.

Only one phrase apears to be a precise guide, "member of the Communist Party." The words "affiliated with," "believe in," "supports (an) organization" and "unconstitutional methods" (as opposed to force) do not give notice of exactly what are the proscribed beliefs or activities and what is the proscribed degree of involvement. Intensive judicial consideration of the meaning of these phrases in particular contexts attests to the difficulties which face an active labor union leader in understanding the precise conduct, or "belief" about which he must swear his innocence.

The Supreme Court has recently pointed out in *Winters* v. *New York, supra* (pp. 509-510):

"The appellant contends that the subsection violates the

---

[7] As one writer has put it, the statute involves "a kind of resurrection of the old Inquisition, through which heretics were burned alive because of beliefs or disbeliefs that they were forced to reveal. The act is reminiscent also of the law of 'Merry Old England' under which a man might be hanged, drawn, and quartered for merely 'imagining' the death of the King." Barnett, *"The Constitutionality of the Expurgatory-Oath Requirement of the Labor Management Relations Act of 1947,"* 27 Ore. L. Rev. 85, 93.

> right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California,* 283 U.S. 359, 369; *Herndon* v. *Lowry,* 301 U.S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

There are two fundamental bases for the requirement in civil rights cases of specific definition of the activity which the statute seeks to regulate. First, the blurring of the lines delimiting the coverage of the statute inhibits free expression. The possibility of invoking whatever adverse consequences the statute may have in store for those who violate its terms paralyzes freedom of expression. It is an effective previous general restraint upon all activity which might possibly be touched by the penumbra of the indefinite groupings and classifications established. See *Stromberg* v. *California, supra; Herndon* v. *Lowry, supra; Near* v. *Minnesota,* 283 U.S. 697, 712; *Thornhill* v. *Alabama, supra* (pp. 100-101); *Cantwell* v. *Connecticut, supra.* Clearly in point, likewise, is *Thomas* v. *Collins, supra* (pp. 535-536), in which the Court pointed out that the vagueness of the statute setting up "solicitation" as the area of speech to be regulated left no security for the exercise of the rights which the statute did not purport to reach.

> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not

> be invitation. The sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause. The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card."

See, also, Z. Chafee, *Free Speech in the United States* (1946), pp. 474-475.

A second, and closely related reason for this test, is that vagueness in a statute infringing civil rights lays the basis for discriminatory and unfair application. The absence of precise standards makes possible arbitrary enforcement and discrimination in applying the statutory standards where unpopular minorities are involved. Thus in *Jones* v. *City of Opelika,* 316 U.S. 584, 611 (dissenting opinion later made the opinion of the majority in 319 U.S. 103), the Court observed that the record showed that the license fee requirement struck down in that case had been discriminatorily imposed upon the members of Jehovah's Witnesses but not upon ministers of other faiths.

The Court stated (p. 617):

> "We need not shut our eyes to the possibility that use may again be made of such taxes either by discrimination in enforcement or otherwise, to suppress the unpalatable views of militant minorities such as Jehovah's Witnesses . . . As the evidence excluded in No. 280 tended to show, no attempt was there made to apply the ordinance to ministers functioning in a more orthodox manner."

See, also, *Thornhill* v. *State of Alabama, supra* (pp. 97-98); *West Virginia* v. *Barnette, supra,* (p. 628); *Cantwell* v. *Connecticut, supra; Lovell* v. *Griffin, supra; Hague* v. *C.I.O., supra.*

We have observed previously, in Section I above, that such terms as "Communist-Front organizations," "party-line officers," "fellow-travellers" and "subversive officers" have been used by sponsors of Section 9 (h) as equivalents for the categories set up in the Section. Such terms are common in the political arena and, even more so, in industrial disputes. It

is evident that the reasons for the requirement of definiteness have particular application to petitioners, for charges of adherence to subversive political views have been repeatedly resorted to in order to impair the effective functioning of labor organizations.

Most revealing has been the use of this technique in the campaign to nullify the efforts of the Political Action Committee of the Congress of Industrial Organizations. The Un-American Activities Committee issued a Report on the CIO Political Action Committee (*House Report No. 1311, 78th Congress, 2d Session,* March 29, 1944), which stated categorically (p. 76) "A clear majority of the most important unions affiliated with the C.I.O. were and are under the domination of an entrenched Communist leadership." The Report also made the following findings:

> "Whether they belong to these unions by choice or coercion, there are millions of these rank and file CIO members who are wholly guiltless of any sympathy with Communism. The same cannot be said of thousands of the leaders, high and low, of the CIO who are most energetically carrying on the activities of the CIO Political Action Committee." (p. 2.)
>
> "The CIO executive board which established the Political Action Committee is composed of 49 members, among whom there are at least 18 whose records indicate that they follow the 'line' of the Communist Party with undeviating loyalty." (p. 4.)
>
> "A majority (21) of the international unions affiliated with the CIO have an entrenched Communist leadership." (p. 4.)

Of what avail is it to petitioner Philip Murray to know in his heart that he is a patriotic American, that his activities and affiliations have in no way furthered the overthrow of the government; that his every effort has been devoted to the preservation and extension of progressive democratic institutions and that these facts are known to every informed American? Subscribing to the affidavit required by Section 9 (h) might subject him to severe penalties. If it be contended that no penalty would be visited upon him at the moment for claimed false statements in the affidavit, there is, nevertheless,

no assurance that a change in the political temper would not lead to prosecution.

On October 5, 1944, at a public hearing, House Un-American Activities Committee Member Costello made the following remarks concerning the Political Action Committee in discussion with Committee Member Eberharter:

> "MR. EBERHARTER. This committee [Un-American Activities Committee] is using funds appropriated by Congress to employ a high-salaried personnel for a purpose which I think is highly improper, and as I said before, I think every informed observer in Washington will agree with me on that.
>
> "MR. COSTELLO. I will say to the gentlemen that the funds of this committee were appropriated to carry on the work of the Special Committee to Investigate Un-American Activities.
>
> "MR. EBERHARTER. The funds were not appropriated for political campaign purposes.
>
> "MR. COSTELLO. We are not conducting any political campaign whatsoever. We are investigating the subversive activities of the Political Action Committee. We are investigating their Communist background, and that is the purpose for which the funds have been appropriated by the Congress, namely, to investigate these subversive organizations. And, if the gentleman from Pennsylvania thinks he can truthfully say, in view of the evidence that has been presented to this special subcommittee, that the Political Action Committee of the C.I.O. is not a Communist-front organization, then this Dies committee has never displayed to the country any Communist-front organization." (Volume 17, Hearings, October 5, 1944.)

On March 9, 1944, the then chairman of the Un-American Activities Committee, speaking on the floor of the House of Representatives, said of the Political Action Committee:

> "Mr. Speaker, the origin of the idea of the C.I.O. political action committee is of real importance. That origin was definitely within the Communist Party and some of its leaders . . . An examination of the views of Rhylick, Browder, and Dennis shows how they anticipate in every detail the organization and activity of the C.I.O. political action committee." (*Cong. Rec.*, March 9, 1944, p. 2438.)

The petitioners believe that continuation of their activities

in the political and economic fields is vital to the public welfare and to their own interests as individuals. The petitioning labor organizations believe that continuation of the activities of their officers, and especially of their officer Philip Murray, is vital to the extension and preservation of their rights and welfare. If the activities of their officers are to be blanketed by the fear of prosecution, if the officers must choose on the one hand between uttering the oath required by Section 9 (h) and stifling their activities to the point where they cannot be included in the categories of Section 9 (h) by any extension of vague and indefinite language by an over-zealous prosecutor or a hostile administration, or on the other hand leaving their chosen vocation of labor union officer or subjecting their organization to grave restrictions, then the rights of the officers and of the labor organizations and their members are in jeopardy.

Petitioners are mindful of the fact that a charge of misrepresentation in the affidavits might well be made at a time when it would be most damaging to the exercise of petitioners' rights. As this Court is aware, charges of subversive activity against labor organizations are frequently made at a strategic time in an organizing campaign or a collective bargaining situation for the purpose of smearing or discrediting the organization.[8] One example will serve to illustrate the use of this technique. On or about March 24, 1941, the Un-American Activities Committee announced that Communists had penetrated into the Steelworkers Organizing Committee of the CIO (the predecessor of the petitioning labor organization), and that a tie-up of the steel industry was being planned. These statements were issued at a time when the Steelworkers Organizing Committee was negotiating with the U. S. Steel Corporation.

Petitioner Philip Murray, in a communication to the Un-American Activities Committee on or about March 26, 1941, said—

". . . It seems strangely significant that your ground-

[8] During congressional debate, Congressman Klein pointed out that "this provision seems better calculated to evoke slander, recriminations, and confusion, than to approach a solution to the Communist problem." (93 *Cong. Rec.* 3537, April 15, 1947.)

> less charges against C.I.O. always come at a time when they can do the most harm. Obviously you are aware of the negotiations now being conducted with the United States Steel Corporation and the coal operators. I also recall your moving into Chicago last year at exactly the same time that a C.I.O. union was engaged in a Labor Board election at the Armour and Company plants." (*Cong. Rec., 77th Cong., 1st Session,* March 31, 1941, App. pp. 1508-1509.)

It need hardly be pointed out that the phrase in the statute condemning beliefs or membership in or support of "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods," can readily be used to undermine the exercise of legitimate rights by labor unions and their leaders. Charges of belief or membership in "Communist-front" organizations have been characteristically used to undermine the rights of self-organization and collective bargaining which the Act purports to protect. Thus, in *National Labor Relations Board* v. *Sunbeam Electric Manufacturing Company,* 133 F. (2d) 856, 858 (C.C.A. 7), the court, in sustaining a Board finding of employer unfair labor practices, thus summarized a portion of the evidence:

> "Vice President Schroeder addressed the employees over a public address system during the lunch hour at the very time the Board was considering the union's petition. He stated that the union was not qualified as a representative of the employees because it was dominated by Communists. The information as to the domination of the union by Communists was derived from statements contained in the reports of the House Committee to Investigate Un-American Activities, commonly known as the Dies Committee, and from newspapers and magazines. Even these sources of doubtful authority admitted the president of the organization was not a Communist, but they did charge that two of the organizers were Communists."

For examples of the use of the appellation "reds, radicals, and Communists" and variants, to interfere with self-organization of employees, see *N.L.R.B.* v. *Reynolds Wire Co.,* 121 F. (2d) 627, 628 (C.C.A. 7); *Reliance Manufacturing Company* v. *N.L.R.B.,* 125 F. (2d) 311, 314 (C.C.A. 7); *Rapid*

Roller Co. v. *N.L.R.B.*, 126 F. (2d) 452, 456 (C.C.A. 7); *N.L.R.B.* v. *Eclipse Moulded Products Co.*, 126 F. (2d) 576, 580 (C.C.A. 7); *Interlake Iron Corporation* v. *N.L.R.B.*, 131 F. (2d) 129 (C.C.A. 7); *N.L.R.B.* v. *The Fairmont Creamery Co.*, 143 F. (2d) 668 (C.C.A. 10), certiorari denied 323 U.S. 752; *Hickory Chair Mfg. Co.* v. *N.L.R.B.*, 131 F. (2d) 849 (C.C.A. 4); *Matter of Clayton & Lambert Mfg. Co.*, 34 N.L.R.B. 502, 508; *Matter of Butler Bros. and Alex Wasleff*, 41 N.L.R.B. 843, 857.[9]

It is manifest that the phrase "any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods" is so vague that it may readily be used to impair the effective exercise of petitioners' rights. Other phrases in the statute are no more definite:

"Affiliated with": This phrase never has been subject to precise definition, though it has been studied extensively by our courts. The history of interpretation of that phrase given in the Supreme Court opinion in *Bridges* v. *Wixon*, 326 U.S. 135, is illuminating as to the wide range of possibilities in interpreting this phrase.

The immigration statute there involved (8 U.S.C.A. Section 137 (f) (2)) stated "the giving, loaning or promising of money or anything of value to any organization, association, society or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." Apparently the Congress believed that the use of the word affiliation without more did not make clear its intent that giving, loaning or promising money or anything of value would constitute affiliation, though the Court made it clear that normally "He who renders financial assistance to any organization may generally be said to approve of its objectives or aims." (p. 143.)

A federal court, interpreting the phrase in that statute, stated that affiliation was not proved—

---

[9] Employees of the Board itself have been the targets of similar charges. See Report of Special Committee to Investigate the National Labor Relations Board (H. Rep. 310, pt. 1, p. 150, 76th Cong. 3d Sess. (1940)).

"unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving át least reasonable cause for the charge of a breach of good faith." *United States ex rel. Kettunen* v. *Reiner,* 79 F. (2d) 315, 317 (C.C.A. 2).

The Supreme Court, stated in *Bridges* v. *Wixon, supra,* (p. 142), that Dean Landis had the same conception:

"After stating that 'affiliation' implies a 'stronger bond' than 'association,' he went on to say: 'In the corporate field its use embraces not the casual affinity of an occasional similarity of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails.' And he concluded: 'Persons engaged in bitter industrial struggles tend to seek help and assistance from every available source. But the intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the statutory requirement of affiliation. . . . To expand that statutory definition to embrace within its terms ad hoc cooperation on objectives whose pursuit is clearly allowable under our constitutional system, or friendly associations that have not been shown to have resulted in the employment of illegal means, is warranted neither by reason nor by law'."

Judge Sears, an examiner in the case, is said by the Supreme Court (pp. 144-145), to have had the following conception of the meaning of the word:

"Judge Sears in his report stated that 'Affiliation is clearly a word of broader content than membership, and of narrower content than sympathy. Generally, there

will be some continuity of relationship to bring the word into application.' But he concluded that that was not necessarily so in view of the statutory definition. And he added: 'Affiliation may doubtless be shown circumstantially. Assisting in the enterprises of an organization, securing members for it, taking part in meetings organized and directed by or on behalf of the organization, would all tend to show affiliation. The weight to be given to such evidence is, of course, determined by the trier of the fact.' That view was apparently shared by the Attorney General. But the broad sweep which was given the term in its application to the facts of this case is illustrated by the following excerpt from the Attorney General's report:

" 'Judge Sears summarizes Bridges' attitude toward the Communist Party and its policies by saying that the "isolated instances," while not evidence to establish membership in or affiliation with the Communist Party, nevertheless show a sympathetic or cooperative attitude on his part to the Party, and form a "pattern which is more consistent with the conclusion that the alien followed this course of conduct as an affiliate of the Communist Party, rather than as a matter of chance coincidence." This conclusion, said Judge Sears, was strengthened by his consistently favoring nondiscrimination against union men because of Communist membership; and by his excoriating "red baiters," as he called those who took an opposite view, which "amounted to cooperation with the Communist Party in carrying out its program of penetration and boring from within".' "

Justice Douglas, speaking of the phrase (pp. 143, 144), said:

"The legislative history throws little light on the meaning of 'affiliation' as used in the statute. It imports, however, less than membership but more than sympathy. By the terms of the statute it includes those who contribute money or anything of value to an organization which believes in, advises, advocates, or teaches the overthrow of our government by force or violence. That example throws light on the meaning of the term 'affiliation.' He who renders financial assistance to any organization may generally be said to approve of its objectives or aims. So Congress declared in the case of an alien who contributed to the treasury of an organization whose aim was to overthrow the government by force and violence. But he who cooperates with such an organization only in its wholly lawful activities cannot by that fact be said as a

matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term 'affiliation' in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."

It is submitted that petitioners have no guide and no notice because of the use of the phrase "affiliated with" in Section 9 (h), and that the statute is thereby defective.

"Believe in": The requirement of an expurgatory oath as to belief is, in itself, repugnant to American conceptions of freedom, for it is in our tradition that a man be judged by his actions and not by his beliefs. See *supra,* p. 17. And the term "belief" itself is elastic and vague.

As defined in Funk & Wagnalls New Standard Dictionary, the term "belief" has many meanings—to accept as true; to be convinced of; to have confidence in; to credit with veracity; to think trustworthy; to be of the opinion.

Not only do each of these definitions have distinct meanings, but it is a necessary concomitant of the word "belief" and of each of these definitions that variations in degree of intensity create as much vagueness in meaning as do the number of possible definitions. Thus, for example, one may be of a certain opinion in the sense that one may accept that opinion

intellectually, or one may be of a certain opinion in the sense that one is a zealot and advocate of that opinion.

"Supports": In the present context, the word apparently was meant to connote something less than membership, for membership is separately provided for. The difficulty is in determining just how much less than membership is conveyed by the word "supports." In an earlier Section (Section 8 (a) (2)), an employer is barred from "contributing financial or other support to a labor organization." Whether this fuller description applies to Section 9 (h) is not clear. Strikingly different interpretations of the word "supports" as it appears in Section 8 (a) (2) of the 1947 Act (formerly Section 8 (2) of the National Labor Relations Act), make it apparent that the concept is vague and uncertain and gives no adequate notice to those who are affected by its inclusion in a regulatory statute. Section 8 (a) (2) provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

In a decision of the Board, *Matter of Mallinckrodt Chemical Works and American Federation of Labor,* 63 N.L.R.B. 373, the Board upheld findings of its trial examiner, Robert N. Denham, now general counsel of the National Labor Relations Board, in which he indicated that contributions made by an employer to an unaffiliated union's social functions did not constitute "support" within the meaning of Section 8 (2), because the union was well established, the contributions did not determine the success or failure of the union's social functions, and the contributions made by the employer were only a small part of the total contributions received by the union. See, also, *Wyman-Gordon Co.* v. *National Labor Relations Board,* 153 F. (2d) 480, 482 (C.C.A. 7) and *National Labor Relations Board* v. *Algoma Plywood & Veneer Co.,* 121 F. (2d) 602, 610 (C.C.A. 7).

Again, the dictionary definition indicates the wide range of meanings. It has been defined to mean: To endure without opposition or resistance; to bear with; to tolerate; to strengthen the position of by one's assistance; to uphold the rights, complaints, authority or status of; to stand by; to provide for

the maintenance of and bear the expense of. (Oxford English Dictionary.) If, as sometimes happens in the political field, an organization were to complain of a denial of civil rights, an individual who asserted that the organization should be accorded its civil rights might be supporting that organization. If an organization were sponsoring a particular political cause, an individual who contributed financial or other assistance to the organization for the particular project might be considered as supporting the organization. It is submitted that there can be no exact understanding of the meaning of the word "support," and that its utilization in this Section means that the Section must fail under the constitutional test of definiteness which applies in free speech cases.

"The overthrow of the United States Government by force or by any illegal or unconstitutional methods": As was pointed out in *Schneidermann* v. *United States,* 320 U.S. 118, 141-142, attachment to the principles of the Constitution does not exclude the desire for radical and fundamental changes in the Constitution. Those who advocate a cabinet system of government in this country, or those who advocate Union Now with Great Britain, or those who advocate a world state, are clearly advocating changes which will alter our Constitution to a radical extent. Must those who subscribe to the 9 (h) affidavit be innocent of supporting or believing in any such doctrines or supporting any organization which has these doctrines as part of its principles? Compare the discussion by Chief Justice Hughes in *Stromberg* v. *California, supra* (p. 369) with respect to the indefiniteness and ambiguity of the clause "opposition to organized government."

In *United Steelworkers of America, C.I.O., et al.* v. *National Labor Relations Board,* —— F. (2d) —— (C.C.A. 7), decided September 23, 1948, Judge Major, in a dissenting opinion, thus condemned the statute for its vagueness:

> "The section applies to 'each officer of such labor organization and the officers of any national or international labor organization.' Such officers are neither enumerated nor defined, either in the section in controversy or otherwise in the Act. While the record does not purport to disclose a list of such officers, it does show that the agreement between the Union and the company was signed

by six officials of the national organization, including Philip J. Murray, as president, and by nine officers of the local Union. From the agreement it is discernible that there are twenty members of the grievance committee with authority to negotiate on the part of the Union, twenty assistant members of the grievance committee, and a safety committee of equal number authorized to represent the Union in its dealings with the company concerning safety matters. I assume that there are hundreds of officers between the bottom and the top of this vast labor organization. The importance of the word 'officer' is evident, partcularly in view of the fact that 'each officer' is given the power by refusal to make the affidavit to paralyze a Union and its members.

"That those who come within the scope of the word 'officer' have been left in a state of uncertainty and doubt is well illustrated by an opinion of the Labor Board. In The Matter of *Northern Virginia Broadcasters, Inc., etc.*, and *Local Union No. 1215, in the National Brotherhood of Electrical Workers,* page 11, volume 75, Decisions and Orders of the N.L.R.B. In that case, the Regional Director, following instructions of the General Counsel of the Labor Board, dismissed the proceeding for failure of compliance with Section 9 (h) by the American Federation of Labor, with which the local Union was affiliated. The Board held that compliance by officials of the national organization was not required, on the ground that such a construction would make the section unworkable. There was a concurring and a dissenting opinion. The point is that the Board itself had great difficulty in deciding who were included in the term 'officer,' and the decision when made was by a divided Board. This emphasizes the difficult problem presented to officers of a Union in attempting to determine whether they are within the scope of persons required to make the affidavit.

"The facts required to be stated in the affidavit are of such an uncertain and indefinite nature as to afford little more than a fertile field for speculation and guess. What is meant by a 'member of the Communist party or affiliated with such party'? How and when does a person become a member of that party, or any other party for that matter? And what does it mean to be 'affiliated'? The Supreme Court, in *Bridges* v. *Wixon, supra,* devoted several pages to the meaning to be attributed to the word 'affiliation,' as used in the deportation statute. The

court's discussion is convincing that its meaning would be quite beyond the reach of the ordinary citizen. As close as the court came to defining the term was (page 143), 'It imports, however, less than membership but more than sympathy.' The court pointed out that cooperation with Communist groups was not sufficient to show affiliation with the party.

"What does the word 'supports' include? Does a person by voting for the candidates of a party or by attending its meetings and making contributions, or by buying its literature or books, become a supporter thereof? And how can the ordinary person possibly be expected to make an affidavit that he is not a member of any organization that believes in or teaches the overthrow of the United States Government 'by any illegal or unconstitutional methods'? These are matters which perplex the Bench and the Bar, and the diversity of opinion among Judges as to what is illegal and unconstitutional often marks the boundary line between majority and dissenting opinions.

"See the recent case of *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, and particularly the concurring opinion by four members of the court, which held unconstitutional Section 313 of the Federal Corrupt Practices Act of 1925, as amended by Section 304 of the instant Act, because of the vagueness and uncertainty of the phrase, 'a contribution or expenditure in connection with any election * * *.' The discussion is quite relevant to the instant situation. On page 153 it is stated:

" 'Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long-established constitutional principles surrounding their delimitation. They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage. In this respect the amendment's policy adds its own force to that of due process in the definition of crime to forbid such consequences. * * * Only a master, if any, could walk the perilous wire strung by the section's criterion.' "

In considering the vagueness of the statute it is important to bear in mind that any false statement is to be punished under

Section 35-A of the Criminal Code (18 U.S.C.A., sec. 80). The crime there defined is to make or cause to be made "any false or fraudulent statements . . . in any matter within the jurisdiction of any department or agency of the United States . . ." The issue in a prosecution under this statute is no longer whether it can be a crime to entertain opinions of which Congress disapproves, but only whether the accused described his beliefs accurately. The issue of truth and falsity and of the defendant's intent would then become questions of fact for a jury. *United States* v. *Presser,* 99 F. (2d) 819 (C.C.A. 2). In such a prosecution, he could not challenge the constitutionality of Section 9 (h), since that would be a matter collateral to the crime charged. *Kay* v. *United States,* 303 U.S. 1, 6; *United States* v. *Barra,* 149 F. (2d) 489 (C.C.A. 2).

The experience of petitioner labor organization and other labor organizations and their officers and members has educated them to the fact that vague charges of "subversion" and "disloyalty" are weapons in industrial disputes. There is overwhelming evidence in our country today of this fact. This statute will inevitably lend itself for service as a weapon by those who do not need too much to make a cry of perjury colorable when they have at their command a statute as broad and as vague and as indefinite as this.

III.

SECTION 9 (h) CONSTITUTES A BILL OF ATTAINDER WITHIN THE MEANING OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION AND IS A LEGISLATIVE ACT UNEQUIVOCALLY FORBIDDEN TO CONGRESS

The Constitution expressly excludes a bill of attainder from the legislative powers delegated to Congress. Article I, Section 9, cl. 3 reads: "No Bill of Attainder or ex post facto Law shall be passed." A bill of attainder involves "a use of power which the Constitution unequivocally declares Congress can never exercise." *U. S.* v. *Lovett,* 328 U. S. 303, 307.

A bill of attainder is a legislative act which inflicts punishment without judicial trial upon individuals or easily ascertainable groups. *U. S.* v. *Lovett,* 328 U. S. 303; *McFarland* v.

American Sugar Refining Co., 241 U. S. 79; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

Abhorrence of bills of attainder arises from the same basic tenets of our jurisprudence which have led us to forbid deprivations of life, liberty or property without due process of law. A bill of attainder is an extreme instance of such deprivation. Due process requirements involve notice of the charges brought against an individual, a fair trial in open court, an opportunity to confront and cross-examine witnesses against him, an opportunity to be represented by counsel and an opportunity to present witnesses in his own behalf. None of these safeguards is provided in the case of a bill of attainder. Rather, in a bill of attainder the legislature succeeds in by-passing all of these safeguards by the device of non-judicial sanctions.

The American courts have not been presented with a great number of instances of bills of attainder. This may be explained by the fact that attempts to destroy due process requirements in such complete fashion are characteristic only of periods of political intolerance and hysteria.

> " 'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or gross subserviency to the Crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and trample upon the rights and liberties of others.' Story, Com., sec. 1344." *Cummings* v. *Missouri, supra*, p. 323.

James Madison, writing about bills of attainder, expressed the same thought in *The Federalist*, No. 44:

> "Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and pri-

> vate rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding."

The 1947 Act is in all respects a bill of attainder.[10] A claimed justification for Section 9 (h) is the prevention of the fomenting of industrial strife and the utilization of industrial strife for political purposes. The Act, however, does not go on to impose a sanction against those who foment industrial strife or use industrial strife for political purpose. On the contrary, the Act proceeds, by legislative declaration and finding, to condemn certain categories of individuals as fomenters of industrial strife for political purposes. The Act then provides for the imposition of sanctions and regulations on these persons.[11]

The Act does not proceed, as is the case in legislation that is in accord with constitutional requirements, by way of defining the harmful activity which it seeks to curb, in the present instance, the fomenting of industrial strife and the use of industrial strife for political purposes, and then permitting the judicial function to come into play by providing for regulations and sanctions against union officers who foment industrial strife or against labor organizations whose officers foment industrial strife. The legislature, in Section 9 (h), usurps the judicial office by making legislative findings that certain cate-

---

[10] "Perhaps the most conspicuous trait of the provision is that it is clearly a 'bill of attainder.' " *Barnett, op. cit., supra* (p. 88).

[11] "If Congress had required an affidavit that the officer of the union did not advocate the use of the strike for political purposes or merely to foment strife, and, would not, under penalty so advocate or act, I would find no constitutional objection. But Congress did not do that. It interdicted all members of a named political party." (Prettyman, dissenting, *N.M.U.* v. *Herzog*, 78 F. Supp 146, 180.)

gories of people are responsible for the harmful activity. The function of the judicial process under Section 9 (h) is not to determine whether an individual or individuals has engaged in the activity which the legislature is seeking to curb, but merely to determine whether an individual or individuals comes within the legislatively defined categories of those who are deemed by the legislature to be guilty. This is at the very heart of a bill of attainder and exemplifies its meaning.

The majority of the Court in *N.M.U.* v. *Herzog,*[13] in its ruling that Section 9 (h) does not constitute a bill of attainder, simply prefers Justice Frankfurter's opinion in *U. S.* v. *Lovett, supra,* to the majority position in that case. Justice Frankfurter, though he agreed with the result of the majority decision on other grounds, indicated his doubt that the congressional action there involved was a bill of attainder, as the majority had found. Justice Frankfurter argued that no punishment was imposed because punishment presupposes an action for which the punishment is imposed. While Justice Frankfurter found that the House believed that there was an offense, "being subversive", the Senate had simply provided for withholding pay from the government employees involved without conceiving this to have any relation to any offense or activity on the part of the government employees.

> "Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to

[13] On June 21, 1948, the Supreme Court handed down the following opinion in this case:

"Per Curiam:—The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of Sec. 9 (f) and 9 (g) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 135, 136, 143, 29 U.S.C.A. Sec. 141, 159 (f), 159 (g) (Supp 1947). We do not find it necessary to reach or consider the validity of Sec. 9 (h).

"Mr. Justice Black and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set down for arguments." 334 U.S. 854.

> go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents 'subversive' and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now pass judgment is the product of both Houses of Congress and the President. The Senate five times rejected the substance of Section 304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of Section 304) without passing any judgment on their past conduct or present views." *U. S.* v. *Lovett, supra* (pp. 324–325.)

It is apparent that even in Justice Frankfurter's view, therefore, Section 9 (h) would be a bill of attainder. There is no doubt from the legislative history (see *supra,* p. 15), that sanctions were imposed for the offense, created by legislative fiat, of holding "subversive" beliefs.

No other technical objection can intrude to blur the fact that Section 9 (h) constitutes a bill of attainder. To constitute a bill of attainder it is not necessary that specific individuals or particular organizations be designated by name; it is sufficient if they are described in general terms which serve to identify the proscribed group. In *U. S.* v. *Lovett, supra* pp. 315-316), the Court said:

> ". . . They *(Cummings* v. *Missouri, supra,* and *Ex parte Garland, supra*) stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of Section 304. We do adhere to it."

In *Cummings* v. *Missouri, supra* (p. 323), the Court said: "Those bills are generally directed against individuals by name but they may be directed against a whole class."

The imposition of penal sanctions is not a necessary attribute

of a bill of attainder. *Lovett* v. *United States, supra; Cummings* v. *Missouri, supra, Ex parte Garland, supra.* In the *Cummings* case, the Court pointed out (pp. 321-322):

> "The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.
>
> "Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being, in effect, punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their endorsement."

In this case we are dealing with a provision which forces union officers of certain political beliefs out of office although such beliefs are lawful. The courts have held that to deprive a person of a right to earn a livelihood at any lawful calling is an act of punishment. In this case, as in all three famous cases dealing with the bill of attainder, *Ex parte Garland, supra; Cummings* v. *Missouri, supra;* and *Lovett* v. *United States, supra,* the statute "operates as a legislative decree of perpetual exclusion" from a chosen profession. *Lovett* v. *U. S., supra,* p. 316.

There have been several recent attempts to enact statutes which seek by legislative finding to declare a group or groups of people guilty of some activity which the proponents of the legislation deem harmful, and which impose sanctions and restrictions against the group and individuals therein. One such proposed statute was the Mundt-Nixon Bill (H. R. 5852) in which, as here, the beliefs of a group were legislatively condemned. The Attorney General recommended against the enactment of the statute in an opinion on June 16, 1948 (attached to this brief as Appendix I), on constitutional grounds.

Section 9 (h) suffers from the same constitutional infirmities, especially since it refers to members of a named political party.

IV.

SECTION 9 (h) DEPRIVES PETITIONERS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND ARBITRARILY DISCRIMINATES AGAINST THEM IN VIOLATION OF THE FIFTH AMENDMENT.

The Supreme Court has observed that most of our constitutional safeguards are related to conceptions of fair dealing and the protection of the individual against abuses by government. *U. S.* v. *Lovett, supra,* at p. 321.

Lack of fairness and violation of due process requirements are pervasive in the 1947 Act. The categories which Section 9 (h) attempts to set up are vague and indefinite. The device of an expurgatory oath is used. The 1947 Act makes a legislative declaration of guilt against labor organizations whose officers may include an individual described in Section 9 (h) and against such officer himself; this constitutes a Bill of Attainder and *a fortiori* is a violation of the due process requirements of the Fifth Amendment.

Similarly, in proceeding upon the assumption that groups of people are collectively guilty of certain beliefs deemed harmful and in imposing sanctions against individuals in such groups, the Act does violence to the doctrine of personal guilt.

> "The deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted.
>
> * * *
>
> "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law. *Schneiderman* v. *United States,* 320 U. S. 118, 154, 63 S. Ct. 1333, 87 L. Ed. 796. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941), pp. 472-475." Justice Murphy in *Bridges* v. *Wixon, supra,* at p. 163.
>
> ". . . under our traditions beliefs are personal and not a matter of mere association, and that men in adhering

> to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman* v. *United States, supra,* at p. 136.

The late Chief Justice Hughes, speaking in opposition to the expulsion of Socialist members from the New York State Assembly said:

> ". . . It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts." (Memorial of the Special Committee appointed by the Bar of the City of New York, New York Legislative Documents, vols. 143, Session (1920), No. 30, p. 4.)

The evils of imputing guilt by association are evident throughout this legislation. Because one political association, the Communist Party, was said to believe in the desirability of some activity which the legislature thought harmful, each and every member of such party is penalized (by legislative, not judicial action), to the extent of being unable to pursue his chosen vocation in the labor movement. In addition, there is the imputation of guilt by association once removed; each and every labor organization which has such an individual among its officers suffers the statutory sanction.

Further, the legislature seeks to include all individuals who may have only a remote relationship with groups, other than the Communist Party, which hold proscribed opinions. And the legislative catch-all applies to those labor organizations whose officers include among them such an individual.

Nor does the statute reach merely those associated in some way with persons or groups advocating proscribed ideas. The statute applies sanctions to individuals for belief and not merely for their belief, but for the belief of others.

Guilt by association, once given legislative recognition, causes a chain reaction.[13] ". . . one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." (James Madison, *The Federalist,* No. 44.)

---

[13] See O'Brian, *op. cit., supra,* at pp. 596-605.

It makes for restriction of civil rights on a broad rather than narrow basis; it makes for vagueness and uncertainty as to the individuals or activities covered. Such legislation is invalid because it does not meet the constitutional tests of the First Amendment. It is also in violation of the due process requirements of the Fifth Amendment.

Due process of law as it is used in the Fifth Amendment is a basic safeguard. One of the things which it has always guaranteed is that no particular person or group should be arbitrarily singled out for legislative action. As the Supreme Court said of the Fifth Amendment in *Hurtado* v. *California,* 110 U.S. 516, 535:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It *must be not a special rule for a particular person or a particular case.*" (Italics supplied.)

Thus even though the Fifth Amendment does not contain, like the Fourteenth Amendment, a clause guaranteeing equal protection of the laws, the courts have recognized not only in the *Hurtado* case, but on many occasions, that discriminatory action which is highly arbitrary and injurious would violate the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U.S. 531; *Wallace* v. *Currin,* 95 F. (2d) 856, 867 (C.C.A. 4), affirmed 306 U.S. 1; *Minski* v. *United States,* 131 F. (2d) 614, 617 (C.C.A. 6); *United States* v. *Ballard,* 12 F. Supp. 321, 325-326 (W.D. Ky.); *U.S.* v. *Yount,* 267 Fed. 861, 863. See, also, *Lovett* v. *United States, supra.*

A law which singles out a particular group in the community for special treatment is justly subject to the condemnation of the Fifth Amendment.

As the court stated in *United States* v. *Ballard, supra* (pp. 325-326):

> "Nothing is more repugnant to the American mind than that . . . among fellow citizens there should be one law for one individual and a different law for another . . . 'Due process of law' has been defined many times as

> meaning the law of the land, and the law of the land implies a general public law, equally binding on every member of the community . . . Purely arbitrary orders directed against individuals or classes are not the law of the land."

We believe that the statute by failing to impose upon employers and employer organizations an affidavit filing requirement and a restriction in their choice of officers is an arbitrary classification in violation of the Fifth Amendment. If the proscribed political beliefs are harmful to industrial relations, they should be deemed equally harmful when entertained by officers of employer groups. Under this statute, labor organizations are virtually forbidden to deal with employers unless they are officered by individuals who hold views approved by Congress. No such limitation is imposed upon employer representatives, nor may it be contended that a comparable sanction—namely, denial of access to the facilities of the Board—is not available. Under the amended Act, the facilities of the Board have been opened to employers for a wide variety of purposes. The failure of Congress to impose upon employers sanctions comparable to those imposed upon labor organizations is an arbitrary discrimination and in violation of the Fifth Amendment of the Constitution.

The discrimination which the statute imposes against labor organizations and their officers is particularly objectionable because it occurs in the field of politics and free expression. The purpose and impact of Section 9 (h) was to impose upon American labor a political orientation approved by Congress. The failure of Congress to limit the political activities of employers and their representatives in similar fashion violates the standard of fairness imposed by the due process clause of the Fifth Amendment.

Section 9 (h) does not present an instance of a situation in which a standard of fairness that is a part of due process requirements has had to yield in some particular to meet a national need. Even in such a case, the due process clause requires strict judicial scrutiny. *Hurtado* v. *California, supra.* This is an instance of a statute which does violence to due process standards, on its face, and at every point in which it

affects the life and liberty of citizens. Such a statute cannot be justified. It must fall under the Fifth Amendment.

V.

THE METHOD OF ENFORCING SECTION 9 (h) DOES NOT SAVE ITS CONSTITUTIONALITY. ON THE CONTRARY, THE STATUTORY SYSTEM OF ENFORCEMENT EMPHASIZES THE UNCONSTITUTIONALITY OF SECTION 9 (h)

Section 9 (h) on its face does not prevent an individual from holding office in a labor union because he refuses to sign the prescribed affidavit, nor does it in terms prevent the labor organization from representing employees or bargaining collectively. The legislative plan is based upon the apparent recognition that individuals are constitutionally immune from punishment for their affiliations and beliefs. To avoid the obstacles which stand in the way of direct sanctions, pressures are created by the statute which are thought capable of effectuating the primary aim of imposing sanctions for political opinion and belief. The statute, by threatening the destruction of a labor organization by its sanctions, seeks to compel the union members to surrender their right to elect officers of their own choice and to compel them to oust officers who refuse to submit to invasion of basic liberties.

We believe that Congress may not do indirectly what the Constitution bars it from doing directly and that, indeed, the sanctions applied to labor organizations of themselves invade the basic rights of the members of these organizations to engage in organizational activity and to select officers of their own choosing. Moreover, we think it clear that the fact that the statutory objective is implemented through the denial of access to a governmental facility—rather than, for example, by a penal law—does not remove the shield of constitutional protection from petitioners.

A. *The sanctions of Section 9 (h) interfere with basic rights to organize and engage in concerted activities.*

The present case arises out of a Decision and Order by the Board in which, *inter alia,* the Board has found that the Company has failed and refused to bargain with the Union.

The right of a labor organization representing the majority of the employees in the appropriate bargaining unit to require an employer to bargain collectively is obviously an important and valuable right. Labor organizations exist and have meaning primarily for the purpose of engaging in collective bargaining. Moreover, the right to engage in collective bargaining with an employer is a vital one to the members of labor organizations. In the absence of such right, the individual members of labor organizations are subject to all of the disabilities resulting from unilateral action by an employer or the handicaps which are imposed by unequal bargaining between the employer and the individual worker. Compare, *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332.

In this case, the Board has refused to make its order that the Company bargain with the Union unconditional, apparently on the ground that a bargaining order is tantamount to certification (see, *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90) and that since the officers of the Union have not complied with the filing requirements of Section 9 (h) an order would frustrate the statutory purpose.

The withholding of the order because it is tantamount to a certification brings into focus other provisions of the statute which impose disabilities upon petitioning unions in the absence of certification. Thus, Section 8 (b) (4) (B) of the 1947 Act provides that it is an unfair labor practice, subject to the sanctions of the Act, for a labor organization—

> ". . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:
>
> * * *
>
> "(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9."

As a result of the operation of this provision the Union, since it is ineligible for a certification, is denied the economic aid of

any other labor organization in seeking bargaining rights. Although prior to the enactment of Section 9 (h) and to the National Labor Relations Act itself, labor organizations enjoyed the right to obtain the assistance of other labor organizations in obtaining recognition or bargaining rights, Section 9 (h) bars petitioners from enjoying such aid because they are ineligible for certification.

Similarly, Section 8 (b) (4) (D) of the Act makes it illegal for a union which has not been certified to use economic means to protect the rights of its members to specific work. This section forbids a labor organization to exert economic pressure where an object thereof is:

> "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . ."

Thus, activities which were plainly legal in the absence of statute, and which continue to be legal when Section 9 (h) is complied with, are outlawed when undertaken by organizations under the ban of Section 9 (h).

But the Act goes to a greater extreme on this point. Upon the mere filing of a *charge* by an employer or by another labor organization that the petitioners are violating Section 8 (b) (4) (D) of the Act, petitioners would be obliged, under Section 10 (k) of the Act, to have the dispute heard and determined by a special tribunal, the Board. But, in the case of an organization certified by the Board, strikes or other economic action would still be legal in a jurisdictional dispute and recourse to the courts, the parent labor organization of the competing unions, or other normal means of settlement would not be obstructed by the invocation of a special tribunal, the Board.

It is mandatory under Section 10 (l) for the Board to apply for a federal injunction against each of the activities described above when a labor organization not qualified under Section

9 (h) is involved, and, further, the activities are specifically denominated illegal for purposes of a suit for damages. Section 303 (a) and (b) of the Act. Section 303 (b) reads:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

No such liability is imposed upon organizations conforming to the affidavit requirement, though such organizations may have engaged in identical activities.

These sanctions, unfair labor practices orders, injunctions and damage suits, also apply to outlaw any economic action by non-conforming labor organizations where the object is "forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." Section 8 (b) (4) (C). An organization may thus be excluded finally and definitely from the collective bargaining process. The prime purpose of its employee members, in organizing together and engaging in concerted activities may be thwarted by this statutory obstacle to its achievement.

What we have said up to this point comes to this: The denial to the Union and the members of the right to bargain collectively by the conditional order in this case involves a loss of important rights by the Union and its members. This denial in itself involves an abridgment of fundamental rights to engage in organizing since the purpose of organizing is collective bargaining. Moreover, the withholding of the bargaining order, although no question existed that the Union represents the majority of the employees, subjects the Union to certain additional disabilities. The Board's ruling that the Union is ineligible for certification exposes it to injunctions and damage suits should it seek to engage in certain forms of concerted activities which have traditionally not been illegal

in this country. Similar disabilities are not imposed upon unions which conform to the affidavit filing requirement.

This case involves the denial to the Union of bargaining rights. But, as is apparent from the language of Section 9 (h) quoted above, that section imposes upon non-conforming labor organizations a broad system of disabilities of which those directly involved here are a particularized instance. Thus, Section 9 (h) prevents a non-conforming labor organization from obtaining any form of statutory relief against employer unfair labor practices of any type. Such a labor organization would be confined to economic warfare alone in protecting itself against employer interference or coercion, against the establishment of company-unions or discriminatory discharges, as well as against a refusal to recognize and bargain. In short, Section 9 (h) would confine petitioning labor organization to the exercise of its economic strength in protection against employer attempts to destroy it.

The extreme scope of Section 9 (h), its impact upon the rights and functions of labor organizations, is perhaps best illustrated by the limitations imposed by that section upon the process of choosing bargaining representatives. Section 9 (h) of course bars an organization with non-conforming officers from the ballot in Labor Board elections. Although it is a purported objective of the statute to assure the designation of employees of "representatives of their own choosing," it is obvious that this objective is entirely frustrated by an election which deprives the employees of the opportunity to choose a candidate which may represent a majority of them. A rival labor organization appearing on the ballot for certification may be an employer-dominated organization but the non-conforming organization would have no opportunity to demonstrate this fact since it cannot initiate a proceeding upon the basis of which a complaint of employer-domination may issue.

The Board has not confined Section 9 (h) to election situations in which the non-conforming union is the petitioner. It has barred the non-conforming union from the ballot when a conforming labor organization filed a petition and the non-conforming union appeared as an intervenor. *Matter of Schneider Transportation Co.*, 75 N.L.R.B., No. 107. Even

in situations in which a labor organization has been the bargaining agent and held a contract, the Board has refused to permit it to defend its bargaining rights against the challenge of the petitioning competitor union. *Matter of Sigmund Cohn & Co.*, 75 N.L.R.B. No. 177. It has adhered to the same rule and has refused to put the name of the non-conforming union on the ballot as well in a case initiated by an employer's petition under Section 9 (c) (1) (B). *Matter of Herman Loewenstein*, 75 N.L.R.B. No. 47.[14]

The Board has ruled, moreover, that an incumbent non-conforming union which has previously enjoyed bargaining rights is not only barred from appearing on the ballot but can only occupy an extremely limited role in the election hearing. It has no voice with respect to the terms and conditions of the election; it may not be represented by watchers at the polls or challenge the eligibility of voters or object to conduct which may interfere with the election either on the part of the employer or of the participating union. If its contract has expired at the time of the hearing it is completely silenced and may not even urge that the unit is inappropriate or that no question concerning representation exists. *Matter of Precision Castings Co.*, 77 N.L.R.B., No. 33.

As this section has been interpreted and applied, a non-conforming labor organization which may have previously enjoyed bargaining rights for years is powerless to prevent collusively arranged consent elections between an employer and a rival organization under which a bargaining unit may be so gerrymandered, voting eligibility standards so juggled, as to insure the election of an unrepresentative bargaining agent. Compare, *Fay* v. *Douds*, 78 F. Supp. 703 (D.C., S.D. N.Y.).

In short, as a result of the application of Section 9 (h) the very purpose of the Act, namely, to promote self-organization and collective bargaining has become perverted; industrial strife and unrest, which it was the purpose of the statute to remove by encouraging freedom of choice and collective

[14] However, where employees filed a petition for decertification under Section 9 (c) (1) (A) (2) to unseat an incumbent non-conforming union, the Board held that the name of the union must be placed on the ballot lest its non-compliance immunize it against removal as the bargaining agent. *Matter of Harris Foundry and Machine Co.*, 76 N.L.R.B., No. 14.

bargaining, have been stimulated. Employers aware of the disabilities imposed upon non-conforming labor organizations have been encouraged to rupture existing bargaining relationships and to question the representative status of unions on any pretext. Other labor organizations have been quick to take advantage of the disabilities the statute confers upon non-conforming labor organizations and "raiding" on a widespread scale has become prevalent.

Nor may it be said that in all of the instances in which non-conforming organizations have suffered injury as the result of their non-conforming status they are left free to utilize their economic power to obtain relief. As already noted, the Act makes it illegal to strike in order to obtain recognition where another labor organization has been certified regardless of the fact that the certified organization may be wholly unrepresentative of the employees. Similarly, an uncertified labor organization, as already noted, is powerless to obtain assistance from another labor organization under the new statute in its efforts to obtain recognition.

Section 9 (h) also invades important rights in connection with union security. Section 8 (a) (3) of the Act reads, in part, as follows:

> "Sec. 8 (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have

certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement . . ."

This provision, in conjunction with Section 9 (h), effectively bars the petitioners from entering a union security agreement. In the absence of this statute, there would be no bar to a labor organization and an employer agreeing to such provisions. Indeed, union security agreements were common prior to enactment of the National Labor Relations Act in 1935, and were characteristic of certain important industries. See Toner, *The Closed Shop* (1942) Ch. 3, p. 58. But, Section 9 (h) denies to petitioners, concededly the bargaining agents of the employees, the right to enter into a union security contract with the employers or to strike to achieve such objectives. *Evans* v. *International Typographical Union,* (D.C., S.D., Ind.), 21 LRRM 2553. No such restrictions are imposed upon labor organizations which have yielded to the affidavit requirements of Section 9 (h); they may pursue the traditional trade union objective of seeking union security.

The administrative effects of Section 9 (h) upon non-conforming labor organizations by no means exhaust the effects of that section. For Section 9 (h) also deprives these organizations of vital access to the courts. This is so because courts will not entertain suits at law or in equity by unions to protect bargaining or organizational rights on the ground that this is an area entrusted exclusively to the Board. See, for example, *Amazon Cotton Mills* v. *Textile Workers Union* 167 F. (2d) 183 (C.C.A. 4); *International Longshoremen's Union* v. *Sunset Line & Twine Co.* (D.C.N.D. Cal.) 21 LRRM 2635. And there is a growing tendency to apply Section 9 (h) standards in State courts.[15]

The full impact of Section 9 (h) upon non-conforming organizations, such as petitioner, is to impair collective bargaining, to imperil its representative status in plants in which

---

[15] The scope of Section 9 (h) is indicated by such cases in state courts as *Fulford* v. *Smith Cabinet Mfg. Co.*, 77 N.E. (2d) 755 (Ind. App. Ct.) which holds "it is the plain intent of the Act that if a union is not eligible for certification it cannot compel recognition as the representative of the employees, and need not be recognized as such." See, also, *Simons* v. *Retail Clerks Union* (Cal. Sup. Ct.), 21 LRRM 2685.

it has functioned for years; to promote the selection of unrepresentative bargaining agents; to encourage industrial unrest; to invite repudiation of the bargaining relationship; to make futile and meaningless the organizing process, and to make illegal the exercise of traditionally sanctioned concerted activities.

As was pointed out by Mr. Justice Prettyman, dissenting, in *N.M.U.* v. *Herzog,* 78 F. Supp. 146, 179:

> "It is perfectly obvious that a labor union which is prohibited from being the bargaining representative of any of its members with any employer, will not remain long in existence. It is denied the chief function of a labor union and obviously can present to employees little reason for membership in it. These are simple, realistic facts."

We believe that the injury imposed upon petitioners in this case amply grounds a constitutional attack upon Section 9 (h). We assert, moreover, that when this injury is viewed in the context of the statutory scheme of which it is an integral part it is plain that petitioning labor organization and its members have been deprived of valuable constitutional rights. For the right to organize necessarily involves the basic right of assembly and the right to communicate and to persuade to action. This was recognized as long ago as 1842 by Chief Justice Shaw, in *Commonwealth* v. *Hunt,* 4 Metc. 111 (Mass.).

As the Supreme Court stated in *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418:

> "Society itself is an organization, and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of working men to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association."

In 1921, in *American Steel Foundries* v. *Tri-City Central Trades Council, supra* (p. 209), the Supreme Court said of labor organizations:

> "They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought

> fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer."

In 1932 in the Norris-LaGuardia Act, Section 102, the broad right of workers to associate was again affirmatively made an object of federal protection.

The National Labor Relations Act in 1935 expressly gave protection to "the exercise by workers of full freedom of association." In 1937 the Court, in upholding the validity of the National Labor Relations Act, held in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34:

> "That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it."

See also *Texas and New Orleans Railroad Co.* v. *Railway and Steamship Clerks,* 281 U.S. 548; *Hague* v. *C.I.O.,* 307 U.S. 496.

As the dissenting opinion in *United Steelworkers of America, C.I.O.* v. *National Labor Relations Board, supra,* points out:

> "It is well to keep in mind, however, what the Board appears to overlook, that is, that employees have certain constitutional rights irrespective of any benefit bestowed by the Wagner Act or its successor. It has been held that the right to organize for the purpose of securing redress of grievances and to permit agreement with the employers relating to rates of pay and conditions of work is a constitutional right, and that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other material protection is fundamental. Further, that employees have as clear a right to organize and select their representatives for a lawful purpose as an employer has to organize its business and select its own officers and agents. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33. And it has been held that the right of workmen or of Unions to

assemble and discuss their own affairs is fully protected by the Constitution as the right of business men, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others. *Thomas* v. *Collins,* 323 U. S. 516, 539. And as employees have a constitutional right to organize, to select a bargaining agent of their own choosing and, if members of a Union, to elect the officials of such Union, so I would think that the bargaining agent when so selected had a right of equal standing to represent for all legitimate purposes those by whom it had been selected. The employees in the instant situation have availed themselves of constitutional rights in selecting the Union as their bargaining agent and in the election of its officials.

"At this point it is pertinent to observe that the Wagner Act was enacted primarily for the benefit of employees and not for Unions. The latter derive their authority from the employees when selected as their bargaining agent, rather than from the law. The very heart of the Act is contained in Section 7, which provides: 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing * * *.' This was not a Congress-created right but the recognition of a constitutional right, which Congress provided the means to protect. This is clearly shown by the declared policy of the Act that commerce be aided 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection'."

Not only the organizing process but the day-to-day functioning of a labor organization involves the exercise of civil rights. In meeting and disseminating ideas, opinions, views and suggestions, in publishing and circulating literature containing such views, in speaking to non-members to induce them to join, and in proposing and supporting legislation, members of labor organizations are expressing their rights of free speech, assemblage, press and petition guaranteed by the First Amendment. See, for example, *Thomas* v. *Collins,* 323 U.S. 516; *Thornhill* v. *Alabama,* 310 U.S. 88.

These rights are improperly invaded by Section 9 (h).

B. ***The sanctions of Section 9 (h), by impairing the right of union members to choose their own officers, invade rights of freedom of assembly and freedom of speech of members of labor organizations.***

The theory of the statute is that, by erecting certain obstructions to their efforts to engage in self-organization and collective bargaining, members of labor organizations may be compelled to eliminate officers holding proscribed views. This novel theory, which seeks to coerce individuals into applying sanctions against others whose political views are deemed harmful, cannot survive the Constitution.

This device constitutes a deliberate interference with the freedom of labor union members to choose their own officers. Congress has commanded that unless the officers who are chosen by labor union members entertain approved political views, the sanctions of the statute will be visited on the labor organization. Labor union members are told that the price for the union's access to the organizational and collective bargaining process is the surrender of the right to choose their own officers. We do not believe that the commerce power, or any other power of Congress, may be used to accomplish this end, for the right to assemble obviously includes within it the right of members of an organization freely to elect their own officers and the right of free speech.

The point is made clearly by Judge Prettyman, dissenting in *N.M.U.* v. *Herzog, supra* (p. 178):

> "This is an abridgment of the rights of the members of the union to select their officers. Since the officers are, realistically and in common practice, the managers of the affairs of the organization and the spokesmen in its behalf, limitations upon their selection are limitations upon the speech and assembly of the members. Certainly the selection of officers is an essential element of an assembly and also of mass speech by a group of individuals."

And the dissent in the *United Steelworkers* case, *supra*, described the impact of the statute on the rights of union members as follows:

> "In order to comply with the condition of the Board's order, they must select a bargaining agent not of their own choosing but one which conforms to the pattern

> which Congress has prescribed. The fundamental right to elect officers of their Union, untrammeled and unfettered, has been made subservient to the congressional edict as to the character of officials which will be tolerated. Not only does the section represent an intrusion by Congress in the internal affairs of a Union and its members, but it is legislative coercion expressly designed to compel Union members to forego their fundamental rights.
>
> * * *
>
> "The upshot of the whole situation is that employees when members of a Union are under a continuing compulsion to elect officers who will meet the congressional prescription in order that their Union may remain in the good graces of the Board, and they must do this even though it be contrary to their belief, conscience and better judgment. Experience, ability, honesty and integrity of candidates for official positions in the Union must be cast aside."

The relationship between the choice of officers and free speech was pointed out by Justice Jackson in his concurring opinion in *Thomas* v. *Collins, supra* (p. 546):

> "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies . . . If free speech anywhere serves a useful social purpose, to be jealously guarded, I should think it would be in such a relationship . . ."

Compare, *Hill* v. *Florida,* 325 U. S. 538.

Of compelling significance is the decision of the Supreme Court in *Martin* v. *City of Struthers, Ohio,* 319 U.S. 141. In that case the municipality passed an ordinance outlawing the distribution of literature when the person distributing it rang a doorbell or otherwise summoned the inmate of the residence to the door for the purpose of receiving such literature. Instead of meeting the problem by permitting such individual to decide for himself whether he would receive the literature, the municipality flatly outlawed the entire practice of ringing doorbells as a means of distributing literature. The Court pointed out (at p. 147), that an appropriate regulation would

leave the decision as to whether distributors of literature might lawfully call at a home where it belongs, namely, with the homeowner or resident himself. The municipality, the Court held, could not substitute its judgment for the judgment of the individual as to whether such literature should be received. In the same way Congress here has substituted its judgment for the judgment of the union member as to choice of union officers.

It is no answer to say that there is no outright interference with the freedom of union members to choose their own officers. It was the intention of the Congress to impose political tests upon union officers. As the House Labor Committee states (H. Rep. No. 245, 80th Cong., 1st Sess., p. 38), the section "makes it incumbent upon union leaders who now tolerate Communist infiltration in their organizations, affiliates, and locals, and who temporize with it, to clean house or risk loss of rights under the new act." But Congress is forbidden by our Constitution to intrude into the area of political belief and opinion either for the purpose of barring individuals from holding office or coercing others to bar them. And Congress may not do indirectly what it is prevented from doing directly either through the use of the commerce power (*Hammer* v. *Dagenhart,* 247 U. S. 251), the tax power (*Linder* v. *United States,* 268 U. S. 5) or any other power. Nor may it impose an otherwise illegal condition by labelling its action the withholding of a privilege rather than the destruction of a right. *Frost* v. *Railroad Commission,* 271 U.S. 583.

C. ***The character of the sanction does not immunize Section 9 (h) from constitutional attack based upon the First Amendment.***

The Board will undoubtedly seek to defend the statute (compare *N.M.U.* v. *Herzog, supra*) upon the ground that the statute does not in fact interfere with the exercise of the basic rights protected by the First Amendment, that Section 9 (h) leaves non-complying labor organizations where the National Labor Relations Board found them in 1935, that it merely withdraws certain "privileges" from labor organizations, and

that these "privileges" may be withdrawn without regard to the tests which are ordinarily applied when constitutional rights are invaded.

As we have already indicated, the impact of the sanctions is such as to make it difficult, if not impossible, for labor organizations to function.

We submit further that in view of the broad impact of Section 9 (h) upon labor organizations, their officers and members, it is unsound and unrealistic to assert that the use of Labor Board facilities is after all a "privilege," the granting or withdrawal of which is immunized from normal constitutional considerations. To speak in these terms is to ignore the fact that Section 9 (h) has converted the Act into an instrument for suppressing the rights which it purports to safeguard and for outlawing activities which have never rested upon federal statute. Fundamentally, such a view disregards the fact that a change in the nature of the protections surrounding unions is a change of such substance as necessarily brings into play constitutional tests.

For some twelve years, the right of employees to self-organization and to act concertedly through representatives of their own choosing has been protected by law. The concept of collective bargaining has become a part of the *mores* of our community and government protection against interferences with self-organization and collective bargaining has become the norm.

The drastic alterations effected by Section 9 (h) in the entire structure of organizational and collective bargaining rights cannot be accomplished without regard to constitutional guarantees. See, *Truax* v. *Corrigan,* 257 U.S. 312; *Senn* v. *Tile Layers' Union,* 301 U.S. 468.

Justice Prettyman, dissenting in *N.M.U.* v. *Herzog, supra* (pp. 179, 180), considered this point from a somewhat different aspect, but arrived at the same result:

> "Congress cannot establish a Government facility which in practice becomes a necessity to activity in that field, and then impose upon the use of the facility a requirement that the persons involved waive a constitutional right; unless the necessities of the situation, which I shall discuss

in a moment, require it. The cases dealing with newspapers and the second-class mail privileges are in point. (*Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, 90 L. Ed. 586, 66 S. Ct. 456 (1946); see Mr. Justice Brandeis and Mr. Justice Holmes, dissenting in United States *ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson*, 255 U.S. 407, 417, 436, 65 L. Ed. 704, 41 S. Ct. 352 (1921).)

"Congress established by the National Labor Relations Act a system for determining an exclusive bargaining representative for employees in appropriate units of employ. As a result of that system, one representative, and one only, is the representative of all the employees in negotiating and contracting with the employer in respect to wages, hours, and terms and conditions of employment. It is perfectly obvious that a labor union which is prohibited from being the bargaining representative of any of its members with any employer, will not remain long in existence. It is denied the chief function of a labor union and obviously can present to employees little reason for membership in it. These are simple, realistic facts. Denial of the privilege of appearing on a ballot in any and every election of bargaining representatives is, in actual fact, a destruction of the union involved. Congress has created a facility the use of which has become an essential to the life of a labor union. A condition imposed upon the use of such facility is a limitation upon the existence of the union. Thus, a requirement as to political belief, imposed upon the use of the facility, is not a mere condition upon a privilege; it is, in fact, an abridgment of political belief."

Even if it be assumed that all that is involved here is the formal withdrawal of facilities that are made available to others rather than outright extinguishment of constitutional guarantees, that fact would not serve to cure the defects of the statute. For a denial to unions of facilities of the Act affects large numbers of individuals in important ways. Such a denial therefore is not constitutionally distinguishable from a denial of the use of the mails (*Hannegan* v. *Esquire*, 327 U. S. 146), the public parks (*Saia* v. *People of New York*, 334 U. S. 558), the public schools (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *People of State of Illinois, ex rel. McCollum* v. *Board of Education*, 333 U. S. 203), public thoroughfares and highways

(Hague v. *C.I.O.,* 207 U. S. 496, *Marsh* v. *Alabama,* 326 U. S. 501) and public buildings (*Danskin* v. *San Diego Unified School Dist.,* 28 Cal. (2d) 536, 171 P. (2d) 886). Not only these but even cases involving only property rights (see, for example, *Frost* v. *Railroad Commission,* 271 U. S. 583, 593) make it clear beyond question that it is no defense to a denial of constitutional guarantees that the denial has been accomplished by the withdrawal of a facility. Moreover, these cases make it abundantly clear that it is no defense to a denial of constitutional guarantees that the rights which have been invaded by the withdrawal of governmental facilities may be exercised in alternative ways or places. The fact that the individuals and groups who suffer impairment of their constitutional rights may resort to alternative public or private facilities in no way justifies interferences with their freedom through conditioning the use of a particular governmental facility. See, in addition to the cases cited above, *Schneider* v. *New Jersey,* 308 U. S. 147, 163, where the Supreme Court declared that "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Indeed, where, as here, the fact that the facility is "largely gratuitous makes clearer its position as a right, for it is paid by taxation." Justice Brandeis, dissenting, in *U. S. ex rel. Milwaukee Publishing Company* v. *Burleson,* 255 U. S. 407, 433.

Thus, in the present case, the fact that the union might conceivably (but see, *supra,* p. 49) enjoy organizational or bargaining rights without the use of Board facilities in no way justifies the infringement of basic rights in the withholding of such facilities.

We believe that upon any view of the nature of the sanction imposed by Section 9 (h), the tests normally applied where deprivation of constitutional rights of free expression is claimed are required. Even in the field of immigration, the Supreme Court has rejected a contention that since Congress has "plenary" power in the field, its exercise is not to be judged by standards imposed by the Bill of Rights. *Bridges* v. *Wixon,* 326 U. S. 135.

As a recent writer has put it *(Constitutionality of the*

Taft-Hartley Non-Communist Affidavit Provisions, 48 Col. Law Rev. 253, 257):

> "It is, of course, apparent that Congress is under no constitutional compulsion to create for anyone such facilities as the NLRB affords. However, the same general standard of reasonable discrimination prevails when government bestows services as when it imposes burdens or inflicts punishment. It has been held, for example, that a state may not withhold from Negroes the legal education it provides for others, [*Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right."] nor condition the use of its school buildings for political meetings on an oath disavowing seditious beliefs. [*Danskin* v. *San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P. 2d 886 (1946).] Where Congress has provided work relief to those in need, denial of this aid to Communists, Nazis and aliens has been declared invalid. [*United States* v. *Schneider*, 45 F. Supp. 848 (E.D. Wis. 1942).] In addition, the Supreme Court has indicated that the power to select recipients of second-class mailing privileges is not unlimited. [*Hannegan* v. *Esquire*, 327 U. S. 146, 156 (1946); and see Mr. Justice Brandeis, dissenting in *United States* v. *Burleson*, 255 U. S. 407, 429-34 (1921).] It is common knowledge that innumerable groups and individuals look to the Federal Government for services essential to livelihood. Complete Congressional discretion in dispensing such services would be an anomaly in a system which includes judicially enforced standards of due process."

The statute cannot be shielded from constitutional attack upon the ground that the Government may offer its facilities on any terms it chooses or on the basis of a contention that labor organizations and their officers waive the protection of the Constitution when they use the facilities of the statute, or by an insistence that petitioners may escape the invasion of Constitutional rights by resort to facilities or methods other than those whose use has been unconstitutionally conditioned.

The injuries which Section 9 (h) has imposed upon peti-

tioners are not beyond the reach of this Court. The Constitution deals with realities not labels *(Gompers* v. *United States,* 233 U. S. 604, 610; *Near* v. *Minnesota* 283 U. S. 697, 708), and the Bill of Rights would not be the precious safeguard it is if its applicability turned upon refinements in the character of the restraint. While clothed in the ill-fitting garb of a regulation of commerce (compare *Pollock* v. *Williams,* 332 U. S. 4) the statute suppresses rights which are at the root of our constitutional system. As the Supreme Court has reminded us in *Thomas* v. *Collins, supra* (p. 530), in constitutional cases "it is the character of the right, not of the limitation, which determines what standard governs the choice."

VI.

NO VALID JUSTIFICATION EXISTS FOR THE STATUTORY INVASION OF BASIC RIGHTS OF FREEDOM OF BELIEF, SPEECH AND ASSEMBLY AND THE STATUTE DOES NOT MEET THE TESTS WHICH MUST BE APPLIED WHERE CURBS UPON CIVIL RIGHTS ARE INVOLVED

A. *The burden of establishing that Section 9 (h) is constitutional is upon the Board.*

Ordinarily when regulatory legislation is challenged on the ground that it conflicts with the individual's interest (pecuniary or otherwise) in being free from regulation, its validity can be established by a showing that a permissible legislative power is being reasonably exercised. Regulatory legislation must inevitably impinge on, and limit some individual's private interest in being free from regulation. But under our form of government the authority to make the judgment as to whose interests must yield is vested in the legislature. *Miller* v. *Schoene,* 276 U. S. 272. Indeed, a premise of our democratic system is that the individual is able to participate in the legislative decisions affecting his private interests through the ordinary political processes and the exercise of his right to be heard.

However, when the right to engage in political activity is curtailed the opportunity to influence and receive redress from

adverse official action is cut off. It is therefore not the case that the right of freedom of expression is simply one of a multitude of private interests which the legislature may treat with as it sees fit. The right of free expression and the right to engage in political activity is a basic right because without it the means of obtaining redress against a bad law, the means of insuring peaceful change in a democratic society, is lost.

See, *Schneider* v. *New Jersey,* 308 U. S. 117, 161; *Thornhill* v. *Alabama,* 310 U. S. 88, 101-102; *Bridges* v. *California,* 314 U. S. 252, 262-263.

As we have already pointed out, *supra,* p. 18, there is a key relationship between the exercise of civil rights and our political processes, between the right to political expression and the responsiveness of our government to the will of the people. Because of this the Supreme Court has recognized that Congress cannot be its own judge of the propriety of curtailing rights of political expression and that the courts themselves must undertake a special responsibility for the protection of such rights.

This thought was given expression by Mr. Justice Stone in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153, in which he stated:

> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; on restraints upon the dissemination of information, see *Near* v. *Minnesota,* 283 U. S. 697, 713-714, 718-720, 722; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Lovell* v. *Griffin,* supra (303 U. S. 444); on interferences with political organizations, see *Stromberg* v. *California, supra* (283 U.S. 359) 369; *Fiske* v. *Kansas,* 274 U.S. 380; *Whitney* v. *California,* 274 U. S. 357, 373-378; *Herndon* v. *Lowry,* 301 U. S. 242; and see Holmes, J., in *Gitlow* v. *New York,* 268 U. S. 652, 673; as to prohibition of peaceable assembly, see *DeJonge* v. *Oregon,* 299 U. S. 353, 365.

> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce* v. *Society of Sisters,* 268 U. S. 510, or national, *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Farrington* v. *Tokushige,* 273 U. S. 284, or racial minorities. *Nixon* v. *Herndon,* supra; *Nixon* v. *Condon,* supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Those who advocate legislation abridging rights of political freedom must overcome the presumption of invalidity which attaches to legislative encroachment on such fundamental liberties.

As the Supreme Court pointed out in *West Virginia State Board of Education* v. *Barnette, supra,* at p. 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

See, also, *Thomas* v. *Collins supra,* at pp. 529-530; *Schneider* v. *New Jersey,* 308 U. S. 147.

B. ***Section 9 (h) does not meet the standards by which curbs upon civil rights guaranteed by the First Amendment must be justified***

The Supreme Court, in a long series of cases, has made it very clear that fundamental rights can avoid a clash with the Constitution only if three basic requirements are met:

(1) The statute must be narrowly drawn to deal with the precise evil which the legislature is seeking to curb. *Schneider* v. *New Jersey, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *DeJonge* v. *Oregon, supra.*

(2) The activity in the realm of civil rights which the statute seeks to regulate must be specifically defined so as to leave the individual secure to engage in conduct not within the precise reach of the statute and free of fear of discrimination in enforcement which a loosely drawn statute invites. *Cantwell* v. *Connecticut, supra; Thornhill* v. *Alabama, supra; Herndon* v. *Lowry, supra, Stromberg* v. *California, supra.*

(3) In no event may opinion or belief be regulated or curbed *(West Virginia* v. *Barnette, supra; DeJonge* v. *Oregon, supra)* and where advocacy or expression is regulated, such advocacy or expression must present a clear and present danger to a substantial interest which the State has a right to safeguard. *Bridges* v. *California,* 314 U. S. 252, 261; *Thomas* v. *Collins, supra; Herndon* v. *Lowry, supra; Thornhill* v. *Alabama, supra; Hartzel* v. *United States,* 322 U. S. 680, 687; *Pennekamp* v. *Florida,* 328 U. S. 331, 352-353.

The Board cannot possibly meet its burden of showing that Section 9 (h) meets these constitutional standards.

1. ***The statute is not narrowly drawn but invades basic rights unrelated to its claimed purpose***

The evil to which section 9 (h) is directed is, according to the Board's presentation in *N.M.U.* v. *Herzog, supra,* the utilization of labor organizations, by officers of such organizations holding the proscribed political beliefs, to foment industrial strikes for political purposes. But legislation does not, in fact, direct itself to this claimed disturbance of commerce. This is not a statute which regulates, limits or prohibits a particular kind of strike. It attacks belief, not conduct.

On the other hand, if it is the theory of the statute that labor organizations depart from their legitimate objectives when they elect individuals holding certain political views to positions of leadership we submit that Congress was required to deal narrowly with this problem and with this problem only, carefully adjusting the restraints to the claimed abuse.

In this case all individuals holding broadly defined political views are subject to the statutory restraints and the sanctions are imposed not upon them directly but upon third parties. But just as a state may not cure the "nuisance" of littering the streets by forbidding leaflet distribution or the evil of loud and disturbing noises by forbidding the use of loudspeakers on all occasions, so Congress cannot in Section 9 (h) impose blanket obligations upon whole classes of individuals and address dragnet sanctions to millions of members of labor organizations without regard to the principles of the First Amendment.

In *Lovell* v. *Griffin, supra* (p. 451), the Supreme Court stated that the ordinance there in question

> "is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of streets. The ordinance prohibits the distribution of literature of any kind, at any time, at any place, and in any manner without a permit from the city manager.
>
> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press."

In *DeJonge* v. *Oregon, supra* (at pp. 364-365), the Supreme Court struck down a criminal syndicalism law, saying,

> "The people through their Legislatures may protect themselves against . . . abuse [of free speech or press]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

In *Schneider* v. *New Jersey, supra* (at p. 162), the Supreme Court said:

> "this constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods to prevent littering. Amongst these is punishment of those who actually throw papers on the streets."

In *Thornhill* v. *Alabama, supra* (at p. 105), the Supreme Court struck down a broadly drawn anti-picketing ordinance and pointed out that the statute which is the source of the restriction on free speech must be "narrowly drawn to cover the precise situation giving rise to the danger". See also *Murdock* v. *Commonwealth of Pennsylvania,* 319 U. S. 105, 116 and *Saia* v. *New York, supra.*

If there is one evil which infects Section 9 (h) it is the failure to adhere to this teaching of the Supreme Court in connection with the protection of First Amendment rights.

2. ***The activity which is sought to be regulated is not specifically defined***

As we have already pointed out (*supra,* p. 43), Section 9 (h) is so vague as to present a violation of the Fifth Amendment protection of due process of law. We contend, moreover, that even if the vagueness of Section 9 (h) is not sufficient to bring it within the reach of the Fifth Amendment it nevertheless condemns the section for purposes of the First Amendment. See cases cited *supra,* at pp. 25 *ff*.

The protections of political freedom cannot be safeguarded when, because of the vagueness of the section, labor union leaders are forced to walk a tightrope between the areas of what is forbidden and what is permitted.

The officers of labor organizations have important duties and responsibilities in the political sphere. But if vague legislation makes these leaders timorous in their political activities, if caution tempers their zeal in seeking political goals they and their membership deem desirable, if uncertain notice as to the confines of the statute makes them hesitant about joining together with other individuals and groups in driving toward common political projects, their freedom of political activity, and, more importantly, the freedom of political activity of workingmen and of the organizations in which they have associated, will suffer.[16]

---

[16] It is worthy of note that the filing requirements imposed by Section 9 (h) are not static. The statute requires annual returns and consequently creates a continuing problem with respect to the vagueness of its scope which affects their everyday political activities.

3. ***Section 9 (h) is primarily a curb upon opinion or belief, which enjoys constitutional immunity from any regulation; to the extent that Section 9 (h) regulates expression and advocacy it is unjustified, since the Board cannot meet the clear and present danger test.***

As we have already demonstrated, *supra,* p. 17, Section 9 (h) is primarily if not exclusively a restraint upon opinion and belief. Since this is so, it is an invalid limitation upon constitutional freedoms for which no justification may be offered. However, even if the statute be viewed as one restricting expression or advocacy, it fails to meet the clear and present danger test.

The clear and present danger rule as a test of the constitutionality of statutes restricting freedom of expression has been expressed in various ways. In *Bridges* v. *California, supra,* at p. 263, the Supreme Court said: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." The rationale for this applicable test is given us by the Supreme Court in *Thomas* v. *Collins, supra.* The Court there made it clear (p. 530) that the legislation must have clear support in public danger, actual or impending, and that "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." The Board itself has conceded that Section 9 (h) does not meet this test. *United Steelworkers of America* v. *National Labor Relations Board, supra; Wholesale & Warehouse Workers Union, Local 65* v. *Douds* (S.D.N.Y.), 22 LRRM 2276.

There is attached to this brief, as Appendix II, a letter by Professor Zechariah Chafee which makes it clear that lurid instances of alleged harmful activity by those holding the proscribed political views hardly serve to justify restraints of the type here involved. Random and unparticularized charges that those harboring the proscribed views foment industrial strife and thus threaten our security are hardly of sufficient weight to substitute for the burden of justification which the statute exacts. Fundamentally, this is a statute which owes its existence to hysteria and draws for its justi-

fication on fear rather than fact. The fundamental assumption of the statute is a cynical and irresponsible one, namely, that the members of labor organizations are incapable without coercion of choosing patriotic leaders who will serve their legitimate interests.

It is a gratuitous insult to the American labor movement to suggest, as the Board necessarily must in support of the statute, that labor organizations are so easily subject to manipulation for illegitimate purposes or that workingmen are so stupid and naive that they can be led into action which has a seditious purpose by the mere presence of a Communist, or someone in some vague way associated with Communists, among the officers of the local or national organization. American labor organizations are democratic institutions, democratically operated, and the American workingman, to use the words of Justice Jackson, is fully capable of being his own "watchman for truth"; he does not need and does not trust "any government to separate the true from the false" for him (see *Thomas* v. *Collins, supra,* at p. 545).

CONCLUSION

Section 9 (h) is the most severe provision of a severe statute, the Labor-Management Relations Act, 1947. The section invades constitutional rights of union officers and union members to engage in political activity. A statutory plan which results in a conglomerate of other encroachments upon basic rights adds to the constitutional defects.

Section 9 (h) goes farther than any previous statutory attempt to suppress the freedoms guaranteed by the First Amendment. Section 9 (h) is an attempt to restrict freedom of belief.

Intrusion upon freedom of belief is so contrary to our constitutional scheme and our legal traditions that it was inevitable that the statute pile one constitutional infringement upon another in its attempt to make the restriction effective.

Because belief without more is not proof of activity, it was necessary to draft Section 9 (h) in the form of a bill of attainder, by which a legislative declaration of guilt was made as to individuals and groups.

Because subjective belief is most difficult to ascertain and because the beliefs of individuals are not easily classified into rigid compartments, the statute necessarily sets up indefinite, vague and all-inclusive categories.

Because belief is not subject to objective proof, the individual's innocence was made to depend upon his non-association with others and an expurgatory oath was devised.

Finally, whether because of doubt as to the constitutionality of a direct ban, or for other reasons, a plan was devised whereby pressures, involving loss of fundamental rights, were imposed on third parties to force them, in turn, to impose sanctions upon holders of the proscribed beliefs.

The statute violates all of our constitutional traditions as to the relations of the government and individual. It violates those standards of fair dealing which are the bases of our constitutional guarantees. It requires the rapid and decisive condemnation of this Court.

Respectfully submitted,

ARTHUR J. GOLDBERG
FRANK DONNER
THOMAS E. HARRIS,
718 Jackson Pl. N. W.
Washington 6, D. C.

APPENDIX I

June 16, 1948

Honorable Alexander Wiley
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C.

My Dear Senator:

This is in response to your request for the views of this Department relative to a bill (H.R. 5852) "To protect the United States against un-American and subversive activities."

Section I of the bill would provide that the measure may be cited as the "Subversive Activities Control Act, 1948."

Section 2 would set forth the findings of various congressional committees to the effect that the "world Communist movement," under the direction and control of the Communist dictatorship of a foreign country, is a world-wide revolutionary political movement whose purpose is, by subversive or any other means, to establish a Communist totalitarian dictatorship through the medium of a single world-wide Communist political organization. The findings would also declare that the recent successes of Communist methods in other countries, and the nature of the world Communist movement itself, present a clear and present danger to the security of the United States, making it necessary for the enactment of appropriate legislation to prevent the world-wide conspiracy from accomplishing its purpose in the United States.

Section 3 would provide definitions of the various terms as used in the bill and criteria for determining whether a "Communist political organization" or a "Communist front organization" comes within the definition of those terms.

Section 4 would declare that it shall be unlawful, punishable by a maximum fine of $10,000 and imprisonment for ten years, for any person to participate in any movement to establish a foreign-controlled totalitarian dictatorship in the United States.

Section 5 would provide for the loss of nationality by any person convicted of violating section 4.

Section 6 would provide that it shall be unlawful for any

member of a Communist political organization to be employed by the United States.

Section 7 would provide that it shall be unlawful to issue a passport to any member of a Communist political organization.

Section 8 would require every Communist political organization and every Communist-front organization to register with the Attorney General within specified times, and to disclose organizational information at the time of such registration as well as at specified times thereafter. In addition to information which would be required of both organizations in common, a Communist political organization would be obliged to disclose the names and addresses of its members in its registration statement. However, both types of organizations would be required to maintain accurate records of the names and addresses of their members. In case of the failure of any organization to register in accordance with the measure, it would be the duty of the executive officer and the secretary of such organization to register in behalf of the organization.

Section 9 would provide for the maintenance in the Department of Justice of a "Register of Communist Organizations," which would contain a listing of the organizations registered under the bill and be open for public inspection. The section would also require the Attorney General to submit to the President and to the Congress annually, or when requested by either House by resolution, a report with respect to the execution of the provisions of the measure and related data.

Section 10 would provide that it shall be unlawful for any person to become or remain a member of any organization if (1) there is a final order of the Attorney General requiring such organization to register under section 8 as a Communist political organization, (2) more than 120 days have elapsed since such order became final, and (3) such organization is not registered under section 8 as a Communist political organization.

Section 11 would provide that it shall be unlawful for any organization registered under section 8, or with respect to which there is a final order of the Attorney General requiring it so to register, to transmit in the mails or interstate commerce any publication intended to be disseminated among

two or more persons, unless such publication and its container are labeled as disseminated by a Communist organization; or to broadcast any matter over the radio unless preceded by a statement that it is sponsored by a Communist organization. In each instance the name of the organization would precede its identification as a Communist organization.

Section 12 would deny Federal income tax deductions for contributions to or for the use of any organization registered, or required by order to register, under section 8; and would deny such organization exemption from Federal income tax.

Section 13 would provide that whenever (1) the Attorney General has reason to believe that an unregistered organization is a Communist political organization or a Communist-front organization (or he is requested by resolution of either House of Congress to investigate whether an unregistered organization is within either of these classifications); or (2) he receives from any registered organization an application to be relieved from its classification as such, accompanied by evidence which makes a prima facie showing that the organization is neither a Communist political organization nor a Communist-front organization, it shall be the duty of the Attorney General to institute a full investigation to determine whether the organization is in fact a Communist political organization or a Communist-front organization. The section would provide further, however, that the Attorney General shall not make such a determination without first affording the organization an opportunity for a public hearing. The section would also provide for the attendance of witnesses and production of evidence at the place of hearing.

Should the Attorney General determine that the unregistered organization is within one of the designated classifications, he would make a written report containing his findings, and issue an order requiring the organization to register in accordance with section 8. Should he determine that a registered organization is not within one of the designated classifications, he would make a written report containing his findings, and cancel the registration of such organization.

Section 14 would provide for judicial review of an order issued by the Attorney General pursuant to section 13. Find-

ings of the Attorney General would be conclusive if supported by a preponderance of the evidence.

Section 15 would provide the following penalties: A fine of not less than $2,000 nor more than $5,000 for failure to register or file an annual report as required by section 8, except when such failure is on the part of an officer of the organization, in which case it would be not less than $2,000 nor more than $5,000 and/or imprisonment for not less than two years nor more than five years (each day of failure to register in response to an order would constitute a separate offense in either instance); a fine of not less than $2,000 nor more than $5,000 and/or imprisonment for not less than two years nor more than five years for making any false statement, or omitting any statement which is required or necessary to make information not misleading, with respect to a registration statement or annual report filed under section 8; a fine of not more than $5,000 and/or imprisonment for not more than two years for a violation of any provision of the bill for which no penalty is otherwise provided for in section 4 or 15.

Section 16 would provide that nothing in the bill shall be construed to make the Administrative Procedure Act inapplicable to the exercise of functions or the conduct of proceedings under the bill, except to the extent that the bill affords additional procedural safeguards for organizations and individuals.

Section 17 would provide a separability clause with respect to the validity of the bill and its application.

The bill represents two distinct statutory efforts—one directed to the prohibition and punishment of subversive activities as such, and the other a registration statute calculated to effect disclosure of the identity and propaganda of individual Communists and Communist organizations. Within this framework there have also been incorporated certain other regulatory provisions relating to the general problem. The subversive activities and registration sections of the bill cannot, from a legal standpoint, be separated, but must be judged as a whole. A failure to register under section 8 subjects the organization and certain of its agents to severe penalties. On the other hand, any organization registering as a Communist organization pursuant to section 8 would admit that it is under

the control of a foreign controlled totalitarian dictatorship. Such an admission may render it and its members immediately liable to the penalties of section 4.

Therefore, the measure might be held (notwithstanding the legislative finding of clear and present danger) to deny freedom of speech, of the press, and of assembly, and even to compel self-incrimination. Cf. *United States* v. *White,* 322 U.S. 694. Discussing these constitutional guarantees, the Supreme Court has said in *West Virginia State Board of Education, et al.* v. *Barnette, et al.,* 319 U.S. 624, 642:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

From the language of the bill, it appears uncertain whether mere membership in a Communist organization, as defined in section 3, would constitute a violation of section 4. The principle that a criminal statute must be definite and certain in its meaning and application is well established; a principle which may not be satisfied by the definitions and criteria of the bill. *Connally* v. *General Construction Company,* 269 U.S. 385; *Lanzetta* v. *New Jersey,* 306 U.S. 451.

It is also doubtful whether or not this proposal will meet the requirements of due process under the Fifth Amendment. A statute which would define the nature and purposes of an organization or group by legislative fiat is likely to run afoul of the due process requirements. *Manley* v. *State of Georgia,* 279 U.S. 1 (1929).

The foregoing should not be construed as disapproval of the principle of registration. Application of the principle to some areas of activity is sound and wholesome. Cf. *Bryant* v. *Zimmerman,* 278 U.S. 63. On the basis of past experience with the groups affected by the measure, however, the Department is inclined to believe there would not be any voluntary registrations under the measure. Should a Communist organization fail to register, the burden to proceed would shift to the Attorney General who would then be called upon to employ the administrative provisions of the bill to prove that the organi-

zation is required to register. Under the Act, the Attorney General's action, if successful, would result in the issuance of an order requiring the organization to register. Thereafter, in the event of its registration, activity in its behalf would appear to be proscribed under section 4. Should the organization still refuse to register, membership in it would constitute a crime under section 10 as well as possibly section 4. In summary, the effect of the bill would be to require Communists either to avoid its application altogether, i.e., by refraining or professing to refrain from any activity forbidden by the bill, or be outlawed and subject to prosecution. It can be assumed that no organization would confess guilt by registration and all would deny any activity condemned by the bill.

Outlawing of the Communist Party appears to this Department to be unwise, even if doubts as to the constitutionality of such a step were removed. Outlawing would materially increase the Department's problem of law enforcement. Whereas the Communist Party, to some extent, now operates on the surface, if this bill becomes law it will be forced underground where surveillance of its activities will become increasingly difficult. Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation of this Department, in his testimony before the House Un-American Activities Committee in March 1947, admonished that he "would hate to see a group that does not deserve to be in the category of martyrs have the self-pity that they would at once invoke if they were made martyrs by some restrictive legislation that might later be declared unconstitutional."

The Department deems it also advisable to point out that the public hearing and additional investigative features of the bill, aside from requiring a tremendous expenditure of manpower and funds of doubtful return, would very likely afford Communist organizations an excellent sounding board at the taxpayers' expense.

In my testimony before the Subcommitte on Legislation of the House Committee on Un-American Activities on February 5, 1948, I suggested eight steps whereby the objective of isolating subversive movements in the United States from effective interference with the body politic might be achieved, and

made some suggestions to strengthen existing legislation to assist in carrying out those steps (pages 22 to 24, Hearings before the Subcommittee, February 5, 1948). I adhere to those suggestions. At the same time, I do not believe that sweeping new legislation of this type is required.

Whether the bill should be enacted in the light of the foregoing considerations presents a question of legislative policy. However, the Department of Justice, for the reasons stated, is unable to recommend its enactment.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

TOM C. CLARK
Attorney General

APPENDIX II

Law School of Harvard University
Cambridge, Mass.

May 28, 1948

Hon. Alexander Wiley,
Senate Judiciary Committee,
Washington, D. C.

Dear Senator Wiley:

It is very gratifying that your committee is holding hearings on H.R. 5852, the so-called Mundt-Nixon bill. I am sorry that I have to go to the hospital this afternoon for an operation, or I would send you a much more extensive memorandum on this bill. As it is, I can only ask leave to file with you a few reasons why I feel strongly that the bill should be dropped.

My main reason is that I see no evidence whatever for the necessity of such an unprecedented conglomeration of elaborate regulations of the opinions of private citizens and exceedingly drastic penalties for entirely novel offenses. We already have on the statute books the Smith Act of 1940, with severe penalties for membership in any organization which urges the overthrow of the Government by violence. There are no reported convictions of Stalinite Communists under this act, and so far as I know no such Communist has been thought deserving of prosecution. (The sole reported case involved a Trotskyite labor union; *Dunne* v. *United States* (138 Fed. (2d) 137).) Second, I know of no reported case of a Communist spy, and the paper has reported no prosecutions or arrests of such spies. (Since Gorin was arrested in December 1938; 312 U.S. 429.) Although the activities of such spies in Canada show that they can take place, there is no indication that such activities have occurred or are occurring in the United States. In the third place the Un-American Committee of the House of Representatives spent many thousands of dollars of the taxpayers' money investigating the motion-picture industry. The results of this long investigation were presented by the committee at its hearings last winter. Although I followed these hearings carefully, I did not see a statement that a

single person in the United States was doing anything dangerous to our Government. It is true that three or four writers have since been convicted for refusing to say whether they were Communists. This may go to show that the committee unearthed a few Communists in the motion-picture industry. It wholly fails to show that they or anybody else "present a great and present danger to the security of the United States and to the existence of free American institutions," as section 2 (11) of the bill avers. If there were really a great danger to our Government and our freedom from Communists in the United States, surely there would have been somewhere or other an outburst of unlawful acts or at least tangible evidence of an unlawful conspiracy.

I fully recognize that the Communist Party in Czechoslovakia was a danger to the freedom of Czechoslovakia, and the same is probably true of Italy and other countries. It does not follow that the inclusion of less than one-tenth of 1 percent of our population in a Communist Party here is a real danger to our institutions and our freedom under the very different conditions in this country. We have a very strong Government equipped with existing legislation and efficient Federal police. Our Government does not need any such novel bill as this in order to deal effectively with any actual conspiracy against its existence or any actual effort toward violent revolution. Where inside this country are the facts which justify the establishment of unheard-of regulatory machinery, the expenditure of large sums of money in its operation, and the severe punishment of American citizens because somebody or other has not filled out a piece of paper?

It is now nearly 30 years since my work as a student of freedom of speech led me to pay considerable attention to the activities of Communists in this country. Although I still dislike them very much, it is my considered opinion that they are far less dangerous today than they were in 1919-1920, soon after the Russian Revolution. During those early years that revolution was to many Americans the symbol of a better world. It was assumed to be a heaven on earth. To many idealists it at last appeared possible that men might build a fruitful society without having to seek their own profit. Few

of those who now dream of a city of God can ignore the ugly facts in Moscow. Radicals of my acquaintance who used to speak of Russia as a land of hope are now reduced to saying that it is no worse than any other country. Also social and economic conditions in this country have vastly improved since 1919. The reasons for revolutionary discontent which then existed have greatly been lessened by the legislation under Mr. Roosevelt, the high wages paid during the war and since the realization that Americans of every sort fought and suffered side by side during the war. The national health is far better than in 1919. We have an immunity to revolutionary radicalism far greater. After the First World War drastic Federal legislation was proposed but not passed. The years that followed proved that we did not need it. In some States there were outbursts of suppression which are now regretted. Yet at that time there were tangible evidences like the bomb exploded near the Attorney General's house. If we could get along safely without anything like the present bill in 1919-20, we certainly have no cause for such legislation today.

Turning to the bill itself, I find it has two aspects. First, it sets up an administrative machinery for registration. It does not, however, require all political organizations or all organizations which are somehow associated with politics to register. It practically allows one man, the Attorney General, to single out particular organizations that must register. Although there is an eventual judicial review, the obligation to register is apparently not suspended in the event of an appeal from a ruling of the Attorney General. In view of the serious consequences to an organization from his ruling that it must register, it is important to notice that he does not have to decide that the organization is controlled by a foreign government or is an instrumentality of the world Communist movement. It is enough under section 3 that he thinks it reasonable to conclude that the forbidden conditions exist. He does not have to conclude that they do exist.

In connection with the requirement of registration, it is important to observe that we now have two statutes which require anybody who acts as the agent of a foreign government and any organization subject to foreign control which

is engaging in political activity to register (22 U.S.C.A., secs. 233-233G; 18 U.S.C.A., secs. 14-17). If Communist organizations are now so closely affiliated with the U.S.S.R. as the advocates of this bill seem to urge, then the Attorney General should invoke the two statutes I have cited. The fact that these two statutes have not been used against American Communists indicates that the connection with the foreign government is much more tenuous. The new bill is capable of reaching organizations where this connection is very conjectural. The willingness of certain governmental people to condemn a desirable organization on the basis of very thin evidence is shown by Professor Gellhorn of Columbia in his article in 60 Harvard Law Review 1193 (October 1947), relating the wholly unfounded condemnation of the Southern Conference for Human Welfare by the Un-American Committee of the House of Representatives. This is the sort of organization which might be very well forced to terminate very useful activities by being required to register as a Communist-front organization under section 3 (4) of the bill.

The bill is much more than a registration measure, although it is sometimes represented to be merely that. It imposes many serious penalties upon the expression of opinions and upon membership in organizations which are stigmatized because of their opinions. First, section 4 has no connection with the registration requirements. It punishes any sort of participation in the novel and very vague crime of establishing a totalitarian dictatorship in the United States. Whatever this crime means, it goes far beyond the speech which is punishable under the Smith Act. The statute of limitations does not apply, so that a mature man can be punished for what he did as a college student. Furthermore, in view of the definition of a Communist political organization in section 3 (3), it seems very possible that any active participant in such an organization is guilty of the vague crime which is punishable under section 4. If the organization does not register, its officials can be sent to prison for 5 years under section 15. If it does register, then they may very well make themselves liable to 10 years in prison under section 4. In other words, the registration provisions virtually compel them to confess

their own guilt of attempting to establish a totalitarian dictatorship.

The second penalty is exclusion from Federal employment. This includes teaching in the Washington public schools. Employees and prospective employees who are open to any possible suspicion will be penalized without any trial. They will be deprived of employment because the official responsible for their employment will want to be on the safe side in order to avoid going to prison themselves, under section 6 (b). Observe that he does not have to know that a prospective employee belongs to a forbidden organization. It is enough that he believes it even though his belief is wrong and unreasonable.

The third penalty is that the member of a forbidden organization cannot get a passport, under section 7.

The fourth penalty is that the use of the mails and interstate commerce is subject to a burdensome limitation under section 10. For example, if the Attorney General should be persuaded by the Un-American Activities Committee to share its views about the Southern Conference for Human Welfare, that organization would have to describe itself on all its publications as a Communist organization. This novel stigma recalls the practice of medieval princes to require Jews to wear special marks on their coats.

Therefore in view of these penalties, the question is not merely whether American Communists should be obliged to register. The question is whether American citizens who have not been proved to be dangerous individuals should be made liable to heavy fines and long prison sentences, in large measure because of the activities of other people. A good deal of the bill creates guilt by association. See the article on this subject by John Lord O'Brian in 61 Harvard Law Review 592 (1948).

In this statement I have not gone into questions of constitutionality. The main question before your committee is the wisdom of this bill and not its validity. Such an extraordinary measure can be justified only by a tremendous danger within our Nation. Are these novel penalties, is this novel machinery, required to save the country? It is not enough that Communists are pestiferous people or indulge in big talk about

taking over our Government. The question is whether they are within a million miles of doing so. Jefferson said in 1801: "I believe this is the strongest government on earth." Because I confidently share his belief, I hope very much that your committee will reject this unheard-of bill.

Sincerely yours,

Z. CHAFEE, JR.